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*With the Compiler's Compliments*  
AN

ANALYTICAL DIGEST

OF

SELECTED PRACTICE CASES,

DECIDED IN

**The Common Law Courts,**

TO TRINITY TERM, 1847;

ARRANGED UNDER THE

SEVERAL HEADS OF PRACTICE,

FOR THE

FACILITY OF REFERENCE.

BY

RICHARD MORRIS,  
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

---

LONDON :

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## ADVERTISEMENT.



THE design of the present Digest has been to furnish a Selection of Cases, connected with the Practice of the Common Law Courts, with a special view to an immediate and easy reference ; and, in that particular, to obviate an inconvenience incidental to the arrangement of the several existing Digests, which embrace with practice legal details generally. With respect to the classified arrangement of the subject matter, coupled with the Analytical Index, the compiler is led to hope the work will be found to answer the purpose contemplated. From a desire on his part, not to encumber it with matter, which alterations in the practice have, in a great degree, rendered obsolete, the compiler has deemed it expedient to have had recourse to considerable retrenchment in the selection of cases, which he apprehends will not be found a defect ; but as he is aware the publication is susceptible of much improvement, his attention will be directed to the attainment of that object in a future edition.

KENSINGTON,

*1st October, 1847.*



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## LIST OF THE REPORTS AND ABBREVIATIONS IN THIS DIGEST.

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ABBREVIATIONS.	REPORTS.
Ad. & E. . . . .	Adolphus and Ellis.
Ad. & E., N. S. . . . .	Adolphus and Ellis, New Series.
Anst. . . . .	Anstruther.
Arn. . . . .	Arnold.
Barn. & Ald., or B. & Al. . . . .	Barnewall and Alderson.
Barn. & Ad., or B. & Ad. . . . .	Barnwall and Adolphus.
Barn. & Cr., or B. & C. . . . .	Barnwall and Cresswell.
Bing. . . . .	Bingham.
Bing. N. C. . . . .	Bingham's New Cases.
H. Black. . . . .	H. Blackstone.
B. C. Rep. . . . .	Bail Court Reports.
Bos. & P., or B. & P. . . . .	Bosanquet and Puller.
Brod. & Bing., or B. & B. . . . .	Broderip and Bingham.
C. B. . . . .	{ Common Bench Reports, by Manning, Grainger and Scott.
Car. & Kir., or C. & K. . . . .	Carrington and Kirwan.
Car. & Mar., or C. & M. . . . .	Carrington and Marshman.
Car. & P., or C. & P. . . . .	Carrington and Payne.
Chit. Rep. . . . .	Chitty's Reports.
Cowp. . . . .	Cowper.
Crom. & J., or C. & J. . . . .	Crompton and Jervis.
Crom. & Mee, or C. & M. . . . .	Crompton and Meeson.
Crom. Mee. & R., or C. M. & R. . . . .	Crompton, Meeson and Roscoe.
Dav. & Mer., or D. & M. . . . .	Davison and Merivale.
Doug. . . . .	Douglas.
Dowl. . . . .	Dowling's Practice Cases.
Dowl. N. S. . . . .	Dowling's New Series.
Dowl. & L. . . . .	Dowling and Lowndes.
Dowl. & R., or D. & R. . . . .	Dowling and Ryland.
Durn. & E. . . . .	Durnford and East.
Gal. & Dav., or G. & D. . . . .	Gale and Davison.
Har. & W. . . . .	Harrison and Wollaston.
Horn & H. . . . .	Horn and Hurlstone.
Jur. . . . .	Jurist.
Law J., K. B., or Q. B. . . . .	{ Law Journal, King's Bench, or Queen's Bench.
Law J., C. P. . . . .	Law Journal, Common Pleas.
Law J., Ex. . . . .	Law Journal, Exchequer.
Law J., M. C. . . . .	Law Journal, Magistrates' Cases.
M'Clel. . . . .	M'Cleland.

## ABBREVIATIONS.

ABBREVIATIONS.	REPORTS.
M'Clel. & Y. . . . .	M'Cleland and Young.
Moo. & Rob., or M. & R. . . . .	Moody and Robinson.
Man. & G. . . . .	Manning and Grainger.
Man. G. & S. . . . .	{ Manning, Grainger and Scott, Common Bench Reports.
Man. & Ry., or M. & R. . . . .	Manning and Ryland.
Marsh. . . . .	Marshall.
Mau. & S., or M. & S. . . . .	Maule and Selwyn.
Mee. & W., or M. & W. . . . .	Meeson and Welsby.
Moo. & M., or M. & M. . . . .	Moody and Malkin.
Moo. & P., or M. & P. . . . .	Moore and Payne.
Moo. & S., or M. & Sc. . . . .	Moore and Scott.
Nev. & M., or N. & M. . . . .	Neville and Manning.
Nev. & P., or N. & P. . . . .	Neville and Perry.
Per. & Dav., or P. & D. . . . .	Perry and Davison.
Pr. . . . .	Price.
Q. B. . . . .	{ Queen's Bench Reports, by Adolphus and Ellis.
Ry. & M. . . . .	Ryan and Moody.
Sc. . . . .	Scott.
Sc., N. S. . . . .	Scott's New Series.
Sim. . . . .	Simon.
T. R. . . . .	Term Reports (Durnford and East.)
Taunt. . . . .	Taunton.
Tyrw. . . . .	Tyrwhitt.
Tyrw. & G., or T. & G. . . . .	Tyrwhitt and Grainger.
W. W. & D. . . . .	Willmore, Wollaston and Davison.
W. W. & H. . . . .	Willmore, Wollaston and Hodges.
Woll. . . . .	Wollaston, Practice Cases.

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ERRATA.

P. 195, 11th line from bottom, for "imperfect application," read "*imperfect replication.*"

P. 34, line 24, for "2 W. & M." read "2 *Mee. & W.*"

P. 71, line 7 from bottom, for "2 D. & C." read "2 *Dowl.*"

AN

## ANALYTICAL DIGEST

OF

## SELECTED PRACTICE CASES.

### ABATEMENT OF SUIT.

*Abatement of suit.]* The death of the wife abates a suit brought by her and her husband, for a debt due to her dum sola. *Checci and Wife v. Powell*, 6 B. & C. 253.

It seems the 17 Car. 2, c. 11, which enacts that a suit shall not abate by death of a party between the verdict and judgment, does not apply to a nonsuit. *Dowbiggin v. Harrison*, 10 B. & C. 480; and *Farraine v. Hill*, 4 M. & P. 413.

Where the plaintiff by his own delay has not obtained his judgment until after the death of the defendant, the court will not suffer judgment to be signed nunc pro tunc. *Doe d. Taylor v. Crisp*, 7 Dowl. 584; and *Wilkins v. Cauty*, 11 Law J., Q. B. 191, and *Copley v. Day*, 4 Taun. 702.

Nor in any case except where the delay arises from the act of the court itself. *Vaughan v. Wilson*, 5 Scott, 404; *Evans v. Rees*, 12 Ad. & E. 167.

The 17 Car. 2, c. 8, extends to verdicts in actions for torts, as well as contracts. *Palmer v. Cohen*, 2 B. & Ad. 966.

In case of death of parties, sittings in term not esteemed as one day, so that the trial could have reference to the first day of term, nor can a special adjournment day be obtained to prevent abatement of suit by death. *Johnson v. Budge*, 1 C. M. & R. 647; 3 Dowl. 207.

At the Nisi Prius sittings in the term, the practice is to make up the postea, as of the day on which the cause is tried. The death of the defendant after the first Nisi Prius day in the term, but before the day as of which the postea appears upon the record to be made up, abates the suit. *Halliday v. Saunderson*, 1 Alcock & Napier, 147, (Irish).

The court will under some circumstances stay the postea in the hands of the associate, where it appears that the plaintiff died before verdict. *Johnson v. Hamilton*, 1 M. & W. 149; 4 Dowl. 762.

A suit abates by death of parties, where it is referred, and an award made, but no verdict or judgment entered up. *Maffey v. Godwyn*, 1 N. & M. 101.

## ADMISSION OF DOCUMENTS.

The death of one of two parties who have obtained a certiorari, does not prevent the court from proceeding to dispose of the matter. *Rex v. Justices of Yorkshire*, 6 B. & C. 152.

Where a cause was, by order of Nisi Prius, referred to a barrister to state a special case, and the case was stated after the death of the defendant, the court refused to set it aside. *James v. Crane*, 3 Dowl. & L. 661; 15 Law J., Ex. 232.

Where a verdict was found for the plaintiff on the trial of an ejectment, subject to a special case, and before the terms of the special case were settled the plaintiff died, the court discharged a rule for setting aside the verdict or staying the proceedings, upon the terms of the lessor of the plaintiff giving security for costs. *Doe d. Egremont v. Stephens*, 10 Jur. 570; B. C., Coleridge; 14 Law J., Q. B. 258.

Where there was a verdict for the defendant in an action of assumpsit, and a rule to show cause why there should not be a new trial; and before the rule came on to be heard, the defendant died:— Held, that the rule should still be argued; as in case it was discharged, the judgment would relate to the term in which it was granted, when the defendant was living. *Anderdon v. Lord Foley*, 2 Law J., K. B. 214.

## ADMISSION OF DOCUMENTS.

*Admission of documents.]* A notice to admit, four days before the commission-day at the assizes, is sufficient to entitle the plaintiff to the costs of proof. *Tinn v. Billingsley*, 2 C. M. & R. 253.

*Notice to admit documents in the hands of third parties.]* It is no objection to a party to the cause calling upon his opponent to admit certain documents under Reg. Gen. H. T. 4 Will. 4, that the documents are in the hands of a third party. *Rutter v. Chapman*, 11 Law J., Ex. 178; 8 Mee. & W. 388.

*Notice to admit documents must be given to entitle plaintiff to costs of proving.]* The plaintiff is not entitled to the costs of proving a document, unless he has given a notice to admit it, pursuant to rule of H. T. 4 Will. 4, s. 20, notwithstanding that the document is in issue on the pleadings, and the defendant has refused to admit it, on the ground of its being a forgery. *Spencer v. Barough*, 11 Law J., Ex. 378.

*Costs of proving documents, not admitted after notice to admit.]* Where a judge has certified that the execution of documents has been proved, so as to render a party in a cause, who has refused to admit such execution, liable to pay the costs of proving it, the court will not direct the master to tax the costs while a motion to set aside the verdict, &c., remains undisposed of. *Doe d. Davies v. Davies*, 9 Law J., Q. B. 324; 4 P. & D. 141.

The execution of certain documents not having been admitted by the defendant, the plaintiff obtained the usual judge's order, that the costs of proving them, on the trial, should be paid by the defendant, whatever might be the event of the cause. The trial took place and the plaintiff recovered a verdict, which was afterwards set aside for irregularity, without costs. Previous to a second trial, the defendant admitted the documents:—Held, that the plaintiff, who also succeeded

at the second trial, was entitled to the costs of proving them at the former trial. *Lewis v. Howell*, 6 Ad. & E. 769; 6 Law J., K. B. 182.

*Admission for one trial receivable on another.]* Written admissions made for the purpose of a former trial, may be used on a new trial. If the party who made them wishes to withdraw them, he should take out a summons before a judge, in order to obtain his permission. *Elton v. Larkins*, 5 Car. & P. 305; 1 M. & Ro. 186.

AFFIDAVIT—*In General.*

*The description of the deponent in an affidavit as plaintiff, or as defendant is sufficient.]* On its being objected, that the affidavit of the defendant, on which the rule had been obtained, did not contain his additions, the court said the rule H. T. 2 Will. 4, did not apply to affidavits made by the defendants in the cause. *Jackson v. Chard*, 2 Dowl. 469; *Poole v. Pembrey*, 1 Dowl. 693, further confirmed by *Angel v. Ihler*, 5 Mee. & W. 163.

Held by all the judges, that affidavits made in actions by the plaintiff or the defendant, are exempted from the operation of the rule of H. T. 2 Will. 4, reg. 1, s. 5, which requires that "the addition of every person making an affidavit shall be inserted therein." *Shirer v. Walker*, 2 Man. & G. 917; 3 Scott's N. R. 235.

*Deponent's description in an affidavit.]* "A. B., clerk to C. D., defendant's attorney," is not a sufficient description of a deponent. *Daniels v. May*, 5 Dowl. 83; 1 T. & G. 834.

In an affidavit, "W. A. of No. 37, Threadneedle-street, agent for the above-named plaintiff in this cause," is a sufficient description of the deponent's degree. *Luxford v. Groombridge*, 12 Law J., Q. B. 99, and *Mathewson v. Baistow*, 15 Law J., Q. B. 40.

A prisoner in the custody of the warden of the Fleet need not state his place of abode. *Sharpe v. Johnson*, 4 Dowl. 324; 2 Bing. N. S. 246.

Deponent describing himself as "acting as managing clerk to Messrs. \_\_\_\_\_, attorneys," not stating their place of business, bad. *Graves v. Browning*, 6 Ad. & E. 805.

In an affidavit by an attorney's clerk, it is unnecessary for him to state his residence, if he states that of his master. *Strike v. Blanchard*, 5 Dowl. 216.

A joint and several affidavit was objected to, as being irregular, for want of the addition of one of the deponents. The court refused to allow it to be used as to the statement of facts made by the other deponents. *Rex v. Carnarvon, (Justices)*, 5 N. & M. 364.

But where, to an affidavit by two deponents, the addition of one was defective, and it was urged on the authority of the above case, that it was unavailable altogether, Coleridge, J. allowed it to be used so far as related to the statements made by the co-deponent, observing, that the case quoted must have proceeded upon the peculiar facts. *Ex parte Edmonds*, 5 Dowl. 702, and *Nathan v. Cohen*, 3 Dowl. 370; 1 Har. & W. 107.

An affidavit sworn in London, and describing the deponent as "agent for the defendant in this cause," is sufficient. *Mathewson v. Baistow*, 15 Law J., Q. B. 40; 3 Dowl. & L. 327.

## AFFIDAVIT—*In General.*

An affidavit made by a defendant in a cause cannot be read unless his addition is inserted. *Lawson v. Case*, 4 Dowl. 40, Ex.

In an affidavit made by the defendant, in a cause in support of a rule moved for by him, for security for costs, it is not necessary for him expressly to swear that he is the defendant; it will be sufficient if it appear, with reasonable certainty, from the language of the affidavit, that he is so. *Loutreuil v. Phillippe*, 10 Jur. 757, B. C., Coleridge; 1 B. C. Rep. 87.

*Affidavit—variance in name of deponent and the signature of same.]* Held, to be no objection to an affidavit, that it was made by "E. Charles Pownall," and signed by "Charles Edward Pownall." *Hands v. Clements*, 12 Law J., Ex. 437; 1 Dowl. & L. 379, Ex.

*Affidavit—variance in description of defendant's residence from that in the writ.]* The party who made the affidavit of having been served, described his residence differently from that in the writ, and made no allegation of his being the defendant in the cause; held sufficient. *Stevenson v. Thorne*, 13 Law J., Ex. 303; 2 Dowl. & L. 230.

*Affidavit more than a year old allowed on motion to sign judgment on warrant of attorney.]* A rule to sign judgment on an old warrant of attorney, granted upon an affidavit of the due execution, made above a year before on an unsuccessful application. *O'Neill v. Coghlan*, 2 Dowl. & L. 5.

*Within what time an affidavit may be used.]* An affidavit is not considered stale till it is a year old. *Ramsden v. Maughan*, 4 Dowl. 403; 2 C. M. & R. 634; 1 T. & G. 40.

And cannot be used when moving for a rule when more than a year old. *Burt v. Owen*, 1 Dowl. 691. It has since been held in the Queen's Bench, that, a motion may be made on an affidavit more than a year old, unless the lapse of time affects the subject-matter of the affidavit. *Doe d. Clarke v. Stillwell*, 3 N. & P. 701.

*Affidavit on one rule not admissible on another.]* Affidavits sworn in support of, or in answer to one rule, will not be allowed to be used on another (though substantially embracing one of the objects of the former rule) where any doubt exists as to the practicability of assigning perjury thereon in reference to the rule upon which it is sought to use them. *Quelle v. Boucher*, 1 Scott, 283; 3 Dowl. 107.

*Separate affidavits must be sworn for separate rules although similar.]* Where two rules are moved for under precisely similar circumstances, they should be founded on distinct affidavits; and it is not enough to refer, in the second, to the affidavits already sworn in the first. *The Queen v. Missen*, 11 Law J., Q. B. 189.

*Affidavit used on a motion abandoned, may be used on a subsequent motion.]* An affidavit made and filed in a motion that has been abandoned, may be used in a subsequent motion, where the cause, the subject-matter and the parties, are the same. *Ryan v. Smith*, 9 Mee. & W. 223; 11 Law J., Ex. 77.

An affidavit which is upon the files of the court may be used afterwards in the same cause, though for a different purpose. *Chambers v. Bryant*, 12 Law J., Q. B. 139; and *Ryan v. Smith*, 9 Mee. & W. 223.

*What affidavits may be used on rule to rescind judge's order.]* In

showing cause against a rule to rescind a judge's order, made under 1 & 2 Vic. c. 110, s. 3, for the arrest of a party, or under s. 6, refusing his discharge, either party may read other affidavits than those used before the Judge. *Gibbons v. Spalding*, 12 Law J., Ex. 185; 11 Mee. & W. 173.

*An affidavit used in one court and sworn before a commissioner of another court.]* Where a rule has been obtained in one court, on affidavits sworn before a commissioner of another court, it will be discharged with costs. *Shaw v. Perkin*, 11 Law J., Q. B. 52.

*Affidavit necessary to account for delay in applying to the court.]* Where a motion *prima facie* too late, was explained by a statement not on affidavit, that an application on the same subject had been made to a judge at chambers, which statement the learned judge confirmed by his recollection:—Held, that this was not sufficient, and that there ought to have been an affidavit of the fact. *Goren v. Tute*, 10 Law J., Ex. 61.

*Affidavits for showing cause, when may be sworn.]* Affidavits may be used in showing cause, though sworn after the time named for showing cause in the rule. *Hicks v. Marreco*, 3 Tyr. 216; *Percival v. Hodley*, *ib.* 217.

*A proceeding attached to a defective affidavit cannot be referred to.]* The court cannot entertain an objection patent on a proceeding attached to the affidavit bringing that objection before the court, if, from wrong entitling, the affidavit cannot be read. *Harris v. Mathews*, 4 Dowl. 608.

*Affidavit need not be stamped for a rule nisi for a mandamus.]* The court refused to stop the case on an objection to the use of the affidavits filed by the prosecutor, as they were not stamped. *The Queen v. The Mayor of Litchfield*, 10 Law J., Q. B. 172.

*Costs of long affidavits.]* Where long affidavits are filed in support of a motion, a great part of which is unnecessary, the court will refer them to the master, and make the party applying pay the costs of the unnecessary affidavits. *Lewis v. Woolrych*, 3 Dowl. 692.

*Deponent convicted of subornation of perjury.]* The court will cause to be taken off the file the affidavit of a person who has been convicted of subornation of perjury. *In re Sawyer*, 11 Law J., Q. B. 234.

*Affidavit sworn before an attorney, who is afterwards attorney in the cause.]* It is no objection that the commissioner before whom an affidavit is sworn was the party's attorney, unless shown to be so when the oath was administered. *Beaumont v. Dean*, 1 Tyrw. & G. 209; 4 Dowl. 304.

*Affidavit, form of.]* An affidavit commencing "maketh and saith," omitting the word "oath," is insufficient. *Doe d. Britton and others v. Clarke*, 12 Law J., Q. B. 69; and *Oliver v. Price*, 3 Dowl. 261.

*An affidavit to support a motion must be explicit.]* An affidavit must contain distinct and positive allegations, not suggestions merely. *Reg. v. Manchester Railway Company*, 3 N. & P. 439.

In moving to set aside proceedings, the affidavit must distinctly

show that the step objected to has been taken, and be averred to be true in the present, not the past tense. *Classey v. Drayton*, 6 Mee. & W. 17.

*Affidavits containing impertinent, irrelevant, or scandalous matter.]* The introduction of impertinent or irrelevant matter in an affidavit will induce the court to deprive the party of his costs, though otherwise entitled to them. *Thompson v. Dicas*, 2 Dowl. 93, Ex.; and *Rex v. Byrne*, 6 Dowl. 36, Q. B.

And for irrelevant matter the court have disallowed the costs of such matter, and directed payment of costs to the opposite party. *Cassen v. Bond*, 2 Y. & J. 531; and *Lewis v. Woolrych*, 3 Dowl. 692, Ex.

When affidavits contain irrelevant or impertinent matter, the party by whom they are filed may be punished by the infliction of costs, at the discretion of the court. *Ex parte Heullen*, 7 Price, 594.

If defamatory or scandalous matter be introduced unnecessarily in an affidavit, it may cause the rejection of the deposition. *Sanderson's Bail*, 1 Chit. R. 676; and *Williams v. Hunt*, ib. 321.

*Affidavit in a foreign language.]* An affidavit in a foreign language translated, and the translation verified, and the oath administered in a foreign language, is sufficient. It need not be signed if such be the practice of the country where made. *Re Eady*, 6 Dowl. 614.

An affidavit signed by the deponent in a foreign character, although illegible, may be received, without an affidavit stating that the party was a foreigner. *Nathan v. Cohen*, 3 Dowl. 380.

*An affidavit should be legibly written.]* An affidavit illegibly and slovenly written may be objected to, and costs given against the parties producing it. *Bane v. Jones*, 8 D. & R. 114.

*Alteration in an affidavit.]* A commissioner need not put his initials opposite an immaterial alteration in an affidavit sworn before him. *In re Ineson*, 8 Dowl. 651.

*Alteration in an affidavit after it is sworn.]* Any material alteration in any affidavit after it has been sworn renders it a nullity. *Wright v. Skinner*, 5 Dowl. 92.

Making an addition to an affidavit after it is sworn, does not render it void, but the court will only use the original part. *White v. Skinner*, 1 Tyrw. & G. 597.

*Amendment of an affidavit.]* The wrong year was inserted in the jurat of an affidavit; the court, viewing it as a mere clerical and obvious error, permitted it, on production of a supplemental affidavit, to be amended. *Cooper v. Archer*, 12 Price, 149.

Where an affidavit is erroneously entitled, it may be amended on being re-sworn. *Cooper v. Talbot*, 7 Scott, 345; and *Rex v. Justices of Warwickshire*, 5 Dowl. 382.

When the defect is in an affidavit used in showing cause, the rule may be enlarged to allow an amendment. *Anderson v. Ell*, 3 Dowl. 73, Q. B.

The right to amend an affidavit seems to depend upon whether the

defect is in an affidavit on which a rule has been obtained, or which has been already filed, or only in affidavits used in showing cause, or in moving for a rule nisi. In the two latter instances they are clearly amendable; in the former they are not. *Robinson v. Gardner*, 7 Dowl. 716, Q. B.

AFFIDAVIT—*Entitling of.*

*Title of affidavit in the description of the parties to the suit.]* “Phillips, assignee, &c.,” is an irregular mode of describing a plaintiff in entitling an affidavit. *Phillips v. Hutchinson*, 3 Dowl. 20; and *Casley v. Smith*, 4 Dowl. 477, Ex.

“Geo. Shrimpton v. Wm. Carter the Elder, sued as Wm. Carter,” where the action was by Geo. Shrimpton v. Wm. Carter, rejected. *Shrimpton v. Carter*, 3 Dowl. 648.

An affidavit on the part of the defendant, which is entitled C. D., the defendant, at the suit of A. B., the plaintiff, cannot be read. *Richard v. Isaac*, 1 C. M. & R. 136; 4 Tyr. 863.

The addition of “Widow” to the name of a party in the title of a cause is not necessary. *Miller v. Miller*, 2 Scott. 117.

The christian names of the parties in a cause must be written length in the title of an affidavit. *Maslon v. Carlon*, 4 Dowl. 477 K. B.; *Shaw v. Robinson*, 8 D. & R., 423; and *Masters v. Carter*, Dowl. 577.

An affidavit in support of a rule under 1 Geo. IV. c. 87, must no be entitled “Doe d. Pryme and another v. Roe and another,” but the christian and surnames of all the lessors of the plaintiff must be set out at length. *Doe d. Pryme, v. Roe*, 8 Dowl. 340; and *Doe d. Cousins v. Roe*, 4 Mee. & W. 68; 8 Law J., Ex. 69.

In the writ of summons the plaintiff described the defendant as James S. Hodson; the defendant entered an appearance as James Shirley Hodson; affidavits were produced in support of an application to set aside interlocutory judgment, the title of which described the defendant as James Shirley Hodgson, sued as James S. Hodson:—Held, that they were well entitled. *Dunn v. Hodson*, 1 Dowl. & L. 204, Q. B.

Where a motion is made for a rule to compute principal and interest on a bill of exchange, if the affidavit supporting the application is entitled with the initial of the defendant's christian name only, an affidavit should be produced showing that the defendant so signed the bill. *Hilbert v. Wilkins*, 8 Dowl. 139; and *Worley v. Cunningham*, 8 Dowl. 139. The like as to an application for a distringas. *Ceal v. Cockburn*, 7 Scott N. R. 413; 6 Man. & G. 724.

Where the defendant was described in the writ of summons as “Frederic C. Prosser,” affidavits, in support of a rule to set aside the judgment, &c., for irregularity, entitled “Henry Sims v. Frederic Coulton Prosser,” are improperly entitled. *Sims v. Prosser*, 15 Mee. & W. 151; 15 Law J., Ex. 199; 3 Dowl. & L. 491.

In a subsequent case affidavits in support of a rule for judgment as in case of a nonsuit, entitled “Edward Lomax, plaintiff, against William Wells Kilpin, defendant;” the defendant having been described as “W. W. Kilpin” in the writ of summons:—Held sufficient. *Lomax v. Kilpin*, 16 Law J., Ex. 23.

Affidavits entitled in a cause, without giving the plaintiff the addition of "assignee," cannot be used in a cause where the plaintiff sues as assignee. *Wright v. Hunt*, 1 Dowl. 457.

Where an action has been brought against the defendant by the initial of his christian name, "W.", and has proceeded to execution, so entitled, an affidavit in support of an application against the sheriff for not returning the fi. fa. in the cause, cannot be read, if it describes the defendant by the christian name of "William." *Regina v. Sheriff of Surrey*, 8 Dowl. 510.

The parties should be described in the title of an affidavit as "plaintiff" and "defendant." *Harris v. Griffith*, 4 Dowl. 289; and *Richard v. Isaac*, 1 C. M. & R. 136.

If affidavits, used on a rule, with respect to a matter of arbitration, where there is no cause in court, improperly introduce the words "plaintiff" and "defendant" after the names of the parties in the title of the affidavits, those words may be treated as surplusage. *In re Imeson*, 8 Dowl. 651.

"Casley, assignee," &c. is not a sufficient description of the plaintiff in the title of an affidavit. *Casley v. Smyth*, 4 Dowl. 477; 1 T. & G. 219; and *Clark v. Martin*, 3 Dowl. 222.

The defendant, whose real name was Henry R., was described in the writ of summons and distringas thereon as Humphrey D. R. On an application to set aside the distringas, he entitled his affidavit in the cause "B. v. Humphrey, D. R., sued as Henry R.:"—Held incorrect, there being no such cause until appearance. *Bothwick v. Ravenscroft*, 8 Law J., Ex. 160; 5 Mee. & W. 31; 7 Dowl. 393.

Affidavits made for the purpose of opening a rule respecting two actions, in which the same parties are plaintiff and defendant, must be entitled in both actions; if entitled only in one, they must be entitled afresh and re-sworn. *Corry v. Wharton*, 5 Law J., C. P. 89; 2 Scott, 436.

Where affidavits relate to actions both against the principal and the bail, they are properly entitled in both causes. *Pocock v. Cockerton*, and *Pocock v. Perry*, 8 Law J., Ex. 3; 7 Dowl. 21.

Where the declaration in ejectment contains both joint and several demises, it is sufficient to entitle the affidavit, on motion for judgment, as being on the several demises of all the lessors of the plaintiff, without noticing which are joint and which are several. *Doe d. Barles v. Roe*, 5 Dowl. 447.

An affidavit showing cause against a rule for setting aside an attachment against the late sheriff, for not bringing in the body, should be entitled, not in the original cause, but in that of the Queen *v.* the late sheriff, in a certain cause, (the original one). *Regina v. Sheriff of Middlesex*, 8 Law J., C. P. 39; 6 Law J., Ex. 9; 2 Mee. & W. 107; and *Rex v. Sheriff of Middlesex*, 5 B. & C. 389; 8 D. & R. 149.

The affidavit of the execution of a power of attorney, to demand the performance of an award, must be entitled in the cause. *Doe d. Clarke v. Stillwell*, 6 Dowl. 305.

Affidavits in support of an application to quash a certiorari, bringing up an order of justices for stopping up a road, must be entitled in the names of the parties in the proceeding, and not merely "In the Queen's Bench." *Regina v. Jones*, 8 Dowl. 80.

An affidavit to hold to bail, under 1 & 2 Vic. c. 110. s. 3, made be-

fore the issuing of a writ of summons, need not be entitled in the cause. *Schletter v. Cohen*, 10 Law J., Ex. 99.

J. A. E. was served with a writ of summons, in which he was described as J. E. The writ of summons was, in other respects, informal. The affidavit of J. A. E. upon which to found an application to set aside the copy of the writ, was entitled in a cause A. B. against J. A. E., sued as J. E.:—Held, that it was properly entitled. *Jones v. Eldridge*, 11 Law J., C. P. 192. This case overrules *Swift v. Knight*, 5 Mee & W. 618; 9 Law J., Ex. 6.

An affidavit in support of a rule for judgment as in case of a non-suit, was entitled “Between John Singleton, plaintiff, and George Johnstone, defendant.” On showing cause it was sworn that there were two George Johnstones; and that all former proceedings in the cause were entitled *John Singleton v. George Johnstone the elder*:—Held, that the affidavit was sufficiently entitled. *Singleton v. Johnstone*, 11 Law J., Ex. 88; 9 Mee. & W. 67.

The defendant having entered his claim to certain coffee that had been seized for breach of the revenue laws, and received it back on giving sureties to the crown, commenced an action of trover in the Common Pleas against the seizing officer, who pleaded thereto. A writ of appraisement had issued, but no information had been actually filed:—Held, that the Attorney-General was at liberty to remove the cause into the Court of Exchequer. Held, also, that the affidavits in support of the rule were rightly entitled “The Attorney-General, informant, against John Kingston,” (the plaintiff in the action). *Attorney-General v. Kingston*, 11 Law J., Ex. 72; 8 Mee. & W. 163.

An affidavit verifying a plea in abatement was entitled “between A. B., administratrix, &c. plaintiff, and C. D., defendant:”—Held, irregular. *Fletcher Admix. &c. v. Letchmere*, 12 Law J., C. P. 151.

*Variance in title of affidavit and declaration in ejectment.]* An affidavit of service of a declaration in ejectment, was headed “John Doe on the demise of W. M. and T. C. R.” The declaration was on the demise of T. C. R. and W. M.:—Held, that the variance was immaterial. *Doed. Montgomery & another v. Roe*. 1 Dowl. & L. 695; Q. B.

*Variance in title of cause in writs of summons and distingas.]* In the writ of summons the defendant was described as “C. K.,” in the distingas, and also in the plaintiff’s affidavits, in showing cause against a rule to set aside the distingas, he was described as “C. J. J. K., sued as C. K. :”—Held, that this was an irregularity. *Swift v. Knight*, 9 Law J., Ex. 6, over-ruled, see *Jones v. Eldridge*.

*Title of affidavit where there has been an interpleader issue.]* An issue was directed under the Interpleader Act, and afterwards the claim was abandoned:—Held, on an application to the court for costs, that an affidavit in support of it must be entitled in the names of the parties in the original cause. *Elliott v. Sparrow*, 1 Har. & W. 370.

Where money was paid into court in a cause entitled *Levy v. Coyle*, and a feigned issue directed under the title of *Lane v. Levy*:—Held, that the affidavits for obtaining the money out of court ought to be entitled *Levy v. Coyle*. *Levy v. Coyle*, 12 Law J., Q. B. 294.

*Title of affidavit on motion to set aside attachment.]* Wher

tachment has issued in a cause, in moving to discharge the person arrested under it, the affidavit must be entitled the Queen against the person arrested in the original cause, and not simply in the original cause. *Brown v. Edwards*, 14 Law J., Q. B. 17; 2 Dowl. & L. 520; B. C.—Patteson, J.

*Title of affidavit for judgment on a taxed bill of costs.]* Upon a motion for judgment, under 6 & 7 Vic. c. 73, s. 43, to enforce the payment of the bill of costs taxed, the affidavit must be entitled in the matter of the attorney, and not of any cause. *Hair, in re*, 8 Scott N. S. 231; 2 Dowl. & L. 269.

But where in the name of the attorney as well as in the cause, the court held the affidavit well entitled. *Vallance, in re*, ib. 232.

*Entitling affidavit after the death of the plaintiff.]* A rule was obtained in a cause of B. v. D. calling upon F. (an attorney) to render an account of and pay over money due to B., and the matters of this rule were subsequently referred by rule to the master. B. afterwards died. A rule was then obtained, calling upon F. to show cause why B.'s executors should not be made parties to the two former rules instead of B. This rule and the affidavits on which it was granted were entitled “B. deceased v. D:”—Held, that this was a fatal objection to the rule, there being no such cause as “B. deceased v. D.” *Bland v. Dax*, 15 Law J., Q. B. 1; 10 Jur. 8, Q. B.

*A defect in the title of an affidavit may be amended and the application renewed.]* Where a rule has been discharged, on the ground of the defective title of the affidavits supporting it, the application may be renewed on the same materials. *Regina v. Jones*, 8 Dowl. 307.

*Defect in title or jurat may be amended and application renewed.]* Where a rule is discharged, on the ground that the affidavit, upon which the application rests, is defective in the title or in the jurat, the court will allow the application to be renewed upon the affidavit being amended and re-sworn. But a second application will very rarely be allowed, where there has been any defect in the body of the affidavit. *Mayor &c. of Maidenhead v. The Great Western Railway Company*. 13 Law J., Q. B. 129.

*Title of affidavit in inquisitions in outlawry.]* Where an inquisition has been returned into the office of the Queen's Remembrancer, the affidavits should be entitled accordingly. *Manners, in re*, 5 Mee. & W. 278.

*Title of court in an affidavit of debt.]* An affidavit of debt was sworn in Ireland before a commissioner of the Common Pleas and Exchequer:—Held, that the title of the court need not be prefixed to the affidavit at the time it was sworn, but that an affidavit taken before such commissioner, might be entitled afterwards, and used in either court. *Perse v. Browning*, 1 Mee. & W. 362; 1 Tyrw. & G. 864.

*Title of court omitted in affidavit, how cured.]* An affidavit sworn before a commissioner describing himself as a commissioner of the

Exchequer and Common Pleas in England, may be used in either court though not entitled as of any. *White v. Irving*, 5 Dowl. 289.

*Objection to title of affidavit, when to be made.]* An objection to the title of an affidavit must be entered into before the matter to which it relates is substantially decided. *Viner v. Langton*, 5 Dowl. 92.

*Title of affidavit to cancel bail bond.]* An affidavit in support of a motion to cancel a bail bond, by reason of an arrest under a wrong name, must be entitled in the right name of the defendant. *Finch v. Cocker*, 3 Law J., Ex. 93; 2 C. & M. 412; 4 Tyrw. 285.

*Title of affidavit to set aside proceedings on bail bond.]* Affidavits on a motion to set aside proceedings upon a bail bond may be entitled either in the original action, or in the action against the bail. *Lines v. Chetwode*, 1 Law J., Ex. 79; 2 Tyrw. 177; 2 C. & J. 332; 1 Dowl. 321.

*Title of affidavit on showing cause against discharge of defendant in custody of inferior court.]* Where a suit is commenced in an inferior court, and the defendant sues out a habeas corpus cum causâ, it operates so far as a removal of the cause, that affidavits, on showing cause against the rule for discharging the prisoner, may be entitled in the cause. *Perrin v. West*, 4 Law J., K. B. 232; 5 N. & M. 291.

*Title of affidavit on motion for a prohibition.]* On moving for a prohibition, an affidavit, entitled "In the Queen's Bench," between A., party agent, and B., party respondent, is bad, as there is no such cause in the Queen's Bench. *Gwyn v. Evans*, 12 Law J., Q. B. 68.

*Affidavit wrongly entitled, amended on payment of costs.]* The title of an affidavit on which a rule has been obtained, may be amended on payment of costs, the opposite party being at liberty to file affidavits in reply. *Rex v. Justices of Warwickshire*, 5 Dowl. 382.

*Affidavit wrongly entitled—rule discharged without costs.]* A rule for a new trial in an action of A. v. B., tried before a sheriff, was obtained upon an affidavit verifying the sheriff's notes, which was entitled B. plaintiff v. A. defendant. The rule was discharged without costs. *Bodley v. Reynolds*, 15 Law J., Q. B. 152.

*Title of affidavit where no cause is pending.]* If there be no cause pending, it suffices to entitle the affidavit in the court. *Davis v. Stanbury*, 3 Dowl. 440.

If entitled as in a cause, they cannot be read; and, therefore, if the matter to which the application relates is pending in another court, as in a motion for a certiorari (*Ex parte Nohro*, 1 B. & C. 267);

Or where no cause is as yet pending, as in applications for writs of mandamus, quo warranto, criminal informations (*Rex v. Robinson*, 6 T. R. 642);

Or showing cause against them (*Rex v. Harrison*, *id.* 60);

The affidavits should not be entitled in a cause, but merely in the court; nor should they be entitled in moving for an attachment for the non-performance of an award for setting aside an award, when

there is no cause in fact. (*Bevan v. Bevan*, 3 T. R. 60; *Bainbridge v. Houlton*, 5 East, 21).

*Title of affidavit to strike an attorney off the roll for misconduct.]* The affidavit to ground an application to strike an attorney off the roll for misconduct in a cause, may be entitled in the cause, though judgment has been obtained in it. *Stephens v. Hill*, 10 Mee. & W. 28; 1 Dowl. N. S. 669.

*Title of affidavit on motion to set aside proceedings in error.]* In moving to set aside proceedings in error, the affidavit must be entitled in the cause in error, and not in the original. *Gandell v. Rogier*, 4 B. & C. 862; 7 D. & R. 259.

And on a writ of false judgment from an inferior court, the affidavit should be entitled in the cause in error. *Watson v. Walker*, 1 M. & Scott, 437; 8 Bing. 315.

*Title of affidavit on motion for certiorari.]* The affidavits to support a rule for a certiorari were entitled, "In the matter of the prosecution of The Queen *v. R. Walworth and J. Kent*:"—Held, that the affidavits were irregular and could not be read. *Reg. v. Walworth*, 10 Jur. 967, B. C.—Patteson, J.

*Title of affidavit must accord with the rule.]* Affidavits used in showing cause must be entitled in the same way as the rule. *In re Wilkinson Grantham*, 11 Jur. 242, B. C.

*Affidavit sworn before a commissioner.]* An affidavit entitled in the Court of Exchequer, and purporting to be sworn before J. L. master extraordinary in the Court of Chancery," is defective, for not showing that J. L. was a commissioner for taking affidavits in the Court of Exchequer. Rule discharged with costs. *Frost v. Hayward*, 12 Law J., Ex. 84.

Where an affidavit is duly entitled in the court, a jurat in these terms, "Sworn before A. B. a commissioner," &c., is sufficient. *Burdikin v. Potter*, 9 Mee. & W. 13; 11 Law J., Ex. 82.

Also before H. B., by commission is sufficient. *Hopkins v. Pledger*, 12 Law J., Q. B. 313; and *Fairbrass v. Pettit*, 13 Law J., Ex. 121.

Affidavits sworn before a commissioner must show by the jurat that they were sworn within his jurisdiction. *Cass v. Cass*, 13 Law J., Q. B. 52; 1 Dowl. & L. 698, Q. B.

*Defective jurat—rule obtained on—discharged with costs.]* Rules obtained on affidavits, defective in the jurat, will be discharged with costs. *Frost v. Heywood*, 6 Jur. 1045, Ex.

This rule was acted upon in an application for an attachment. *Cobbett v. Oldfield*, MS. Exch. H. T. 1847.

*Defect in jurat of affidavit, how cured if a rule has been granted.]* A party who has obtained a rule nisi on an affidavit which is defective, on account of the jurat not stating the names of the deponents, cannot

on cause being shown, support his rule by a fresh affidavit; but the court will enlarge the rule in order to allow time for a fresh affidavit to be filed. *Goodricke v. Turley*, 2 C. M. & R. 637; 4 Dowl. 392; 1 Tyrw. & G. 146.

*Omission of the word "court" in the jurat of an affidavit.]* An affidavit entitled in one of the superior courts, and sworn before a judge of that court, as stated in the jurat, "at the central criminal, in the city of London," held sufficient. *Thomas v. Stannaway*, 13 Law J., Q. B. 263; 2 Dowl. & L. 111, Q. B.

*Erasure in the jurat of an affidavit.]* The first page of an affidavit not being capable of containing the whole of the jurat, the words "a commissioner for taking affidavits in this court," were erased from it, and were, together with the rest of the jurat, placed on the back of the page:—Held, that the erasure did not vitiate the affidavit. *Wills v. Dawson*, 12 Law J., Ex. 24.

*Erasure or interlineation in an affidavit.]* An erasure by a line drawn through part of the jurat, vitiates the affidavit. *Williams v. Clough*, 1 Ad. & E. 376.

But where the real date of the jurat was January 31, but the 3 appeared to have been written over a 2, Parke, B., held it to be sufficient, as it was neither an erasure nor interlineation. *Jacob v. Hungate*, 3 Dowl. 456, Ex.

*Erasure of immaterial words in jurat allowed.]* The jurat of an affidavit is not vitiated by the erasure of words which form no necessary part of the jurat, and might be separated from it without altering the sense. *Dawson v. Wills*, 6 Jur. 1068, Ex.

It is no objection to an affidavit that the words "before me" in the jurat are struck out, and the words "by the court" introduced. *Austin v. Grange*, 4 Dowl. 576.

*In a joint affidavit the names of each deponent must be stated.]* The rule is imperative, that upon every affidavit made by two or more deponents, whether sworn in court or elsewhere, it must appear in the jurat that they were severally sworn. *Pardoe v. Terrett*, 12 Law J., C. P. 143.

The names of all the deponents should appear in the jurat. *Houlden v. Fasson*, 6 Bing. 236; 3 M. & P. 559.

Where the jurat of an affidavit used in support of a rule, is defective in not containing the names of the deponents, the court will discharge the rule with costs. *Cobbett v. Oldfield and others*, 16 Law J., Ex. 150.

Where the names of the deponents are omitted in the jurat, through the inadvertence of the judge's clerk, it will be amended by direction of the judge. *Ex parte Smith*, 2 Dowl. 607.

*Date of jurat defective.]* An affidavit purporting to be "sworn in court this 9th day of November, 1845," being Sunday, semble, is defective. *Doe d. Williamson v. Roe*, 3 Dowl. & L. 328.

The want of a date in the jurat of an affidavit, will be ground for discharging a rule with costs. *Blackwell v. Allen*, 10 Law J. Ex. 65.

*Description of the judges' chambers in the jurat of an affidavit.]* An affidavit, the jurat of which stated it to be sworn at the Judges' Chambers, Chancery Lane, in the county of Middlesex, before a judge of the Court of Common Pleas, in the absence of any counter affidavit, held sufficient. *Hemsworth v. Brian*, 14 Law J., C. P. 134.

*Jurat of an affidavit sworn before a judge or a commissioner.]* An affidavit sworn at a judge's chambers, need not state in the jurat that it was sworn *before* the judge. *Empey v. King*, 14 Law J., Ex. 48; 13 Mee. & W. 519.

If sworn before a commissioner it is necessary to be so stated. *The Queen v. The Inhabitants of Bloxham*, 2 Dowl. & L. 168; 14 Law J., Q. B. 13, and *The Queen v. The Inhabitants of Norbury*, 15 Law J., Q. B. 264.

*Jurat where the deponent is an illiterate person.]* When an affidavit is sworn to by an illiterate person, it must appear in the jurat to have been read over to him and explained by the officer. *Haynes v. Powell*, 3 Dowl. 599.

The jurat should also state that the deponent understood it, or it cannot be received. *Haynes v. Powell*, *ib.*

An affidavit of a marksman, which expresses in the jurat that A. B. had been first sworn to the fact that he had read over and explained the affidavit to the marksman, and that he understood it, is insufficient; the officer himself ought to explain it. *Rex. v. Sheriff of Middlesex*, 4 Dowl. 765.

*An affidavit sworn before a consul abroad not admissible.]* An affidavit of service of a rule sworn before the British consul, resident in Paris, is not sufficient. *Williams v. Welch and another*, 15 Law J., Q. B. 7; 3 Dowl. & L. 357; *Le Veux v. Berkeley*, 2 Dowl. & L. 31; 13 Law J., Q. B. 244.

*Description of county in jurat.]* An affidavit to found a criminal information may be read, though the county in which it is sworn does not appear in the jurat, provided it appears in the affidavit itself. *Rex v. Byrne*, 2 N. & P. 152; 6 Dowl. 36; and *Grant v. Fry*, 8 Dowl. P. C. 234.

When an affidavit is sworn before a commissioner, the county should be stated in the jurat. *The King v. Cockshaw*, 2 N. & M. 378; and *Rex v. Burn*, 7 Ad. & E. 190.

*Jurat not signed when sworn, consequence of.]* Where a judge's order, under 1 & 2 Vic. c. 110, s. 3, for arresting a party, and a writ of capias thereon, issued on an affidavit, which was sworn before, but not signed by the judge until after the execution of the writ, the court set aside the writ, and all subsequent proceedings, for irregularity, with costs. *Bill v. Bament*, 10 Law J., Ex. 302; 8 Mee. & W. 317.

setting aside a judgment, signed by the plaintiff for want of a plea, alleged that the defendant had merits and a good cause of defence to the action :—Held, insufficient. The affidavit must express that the defendant hath a good defence on the merits thereof. *Lane v. Isaacs*, 3 Dowl. 652.

An affidavit of merits, that the defendant has a good and sufficient defence on the merits, without words applying it to the particular action, is insufficient. *Tate v. Bodfield*, 3 Dowl. 218.

*The belief of merits on advice of counsel insufficient.]* An affidavit of merits made by the clerk of the defendant's attorney, in which he deposed that he had the management and conduct of the defence of the action, and that the defendant had been advised by counsel that he (the defendant) had a good defence to the action on the merits, and which the deponent verily believed to be true, was held to be insufficient. *Nash v. Swinburn*, 4 Scott N. R. 326; 1 Dowl. N. S. 190.

*The necessary party to swear to merits.]* An affidavit of merits, in support of an application to set aside a regular judgment, must appear to be made either by the defendant, his attorney, or agent, or some person who has been concerned in the cause, in such a way as to make him acquainted with its merits. *Rowbotham v. Dupree*, 5 Dowl. P. C. 557. And if sworn by the managing clerk of the defendant's attorney, must state that he had the management of the particular cause. *Doe d. Fish v. M'Donnell*, 8 Dowl. 501; 4 Jur. 578.

*A good defence must be sworn to.]* It is not a sufficient affidavit of merits to say, that the deponent believes the defendant has a “defence on the merits;” he should say “a good defence.” *Kenney v. Hutchinson*, 4 Jur. 106, Ex.

An affidavit of merits, made by the defendant's attorney as to his belief, from instructions received, is insufficient, where the defendant himself might make the affidavit. *Brown v. Austin*, 4 Dowl. 161.

*Considering a good defence on the merits insufficient.]* Where judgment has been signed for want of a plea, an affidavit of the defendant's attorney, which states, “considering he had a good defence on the merits,” is not sufficient to let in the defendant to plead on terms. *Pope v. Mann*, 2 Mee. & W. 881; 6 Law J., Ex. 204.

*The clerk of the defendant's attorney “is apprised and believes” insufficient.]* An affidavit of merits, by a clerk of the defendant's attorney, “that he is apprised and believes that the defendant has good grounds of defence upon the merits,” is insufficient. *Bromley v. Gerish*, 13 Law J., C. P. 16; 6 Man. and G. 750; 1 Dowl. & L. 768.

*Affidavits when filed may be used by either party.]* Where a rule is enlarged from one term to another, and affidavit filed by a certain day before the term, and the other party takes office copies of them, he has a right to use them, although the party filing them may not be desirous of doing so. *Price v. Hayman*, 4 Mee. & W. 8; 7 Law J., Ex. 297.

AFFIDAVIT—*Filing of.*

*Taking copies of affidavits filed is a bar to an objection as to their being filed in time.]* Where a rule to set aside an award was enlarged from Easter term to Trinity term, upon the term that all affidavits to be used in showing cause should be filed four days before the commencement of the latter term, and on showing cause, it was sought to object to the reading of the affidavits, on the ground that they had not been duly filed; it was held, that the party seeking to raise the objection was estopped from doing so, by having taken office copies of the affidavits objected to. *Re James Mackay and others*, 1 Dowl. & L. 206, Q. B.; 12 Law J., Q. B. 337.

*Affidavits used on motions must be filed.]* In all applications to the court, whether successful or not, the affidavits in support of them must be filed. *Johns v. Mills*, 1 Dowl. 510; and *Ex parte Dicas*, 2 Dowl. 92; and *In re Jeffery*, 1 C. & M. 71.

*Filing affidavits on a motion on the revenue side of the Exchequer.]* Semble, affidavits ought to be filed one day before the rule comes on, on the revenue side of the Exchequer. *Attorney-General v. Jeyes*, 2 C. & J. 352.

*Filing affidavits on enlarged rules.]* A rule having been enlarged upon the application of the defendant, who was allowed to use supplemental affidavits, which, however, had not been filed, it was objected, that it could not be done, because it was not part of the terms of the rule. *Barker v. Richardson*, 1 Y. & J. 362.

In such case the affidavit intended to be used must be filed within the time prescribed by the rule. *Turner v. Unwin*, 4 Dowl. 16; and *Gilson v. Curr*, 4 Dowl. 618.

And the court will not allow them to be filed afterwards, unless it is clearly shown that the not filing them arose from inevitable accident. *Wright v. Lewis*, 8 Dowl. 298.

*Filing affidavits on a reference to the master.]* Where a matter is referred to the master, and he, in the exercise of his discretion, has refused to allow further affidavits to be filed after a particular day, the court will not interfere with that discretion, by requiring him to receive further affidavits. *In re Hall v. Anderton*, 8 Dowl. 326.

*For leave to use affidavits not filed in time—a rule nisi only.]* Where a party is under terms, upon the enlargement of a rule, to file affidavits by a certain day, and he omits by excusable accident to do so, the court will only grant a rule nisi for him to use such affidavits. *Pryor and another v. Swaine*, 13 Law J., Q. B. 214.

*To compel a party to file affidavits used.]* The court will not entertain a substantive motion to compel a party to file affidavits previously used by him, unless he has been first requested to do so. *Pilmore v. Hood*, 8 Dowl. 21, and *Ex parte Elderton v. Lucena*, 2 Dowl. 568.

*Enlarging the time for filing affidavits.]* The court will enlarge the time for filing affidavits, when the parties have not been yet before it,

and the rule is due, though the day specified by the rule is passed. *Reg. v. Keen*, 11 Jur. 308.

Where an affidavit, sworn before a commissioner, was by that commissioner's own act sent up to the court in an imperfect state, the court, though the time for filing affidavits had passed by, allowed it to be sent back to be made perfect, first being satisfied that it had originally been made in due time. *Ex parte Hall*, 8 Law J., Q.B. 211.

## AMENDMENT.

*Amendments, in the discretion of the court.]* Amendments are only permitted when necessary for the success of the proceedings, and are entirely in the discretion of the court or judge to whom the application is made; they are allowed only in the furtherance of justice. *Rex v. Corporation of Grampound*, 7 T. R. 699.

But an amendment will never be allowed where the proposed alteration would operate prejudicially upon the rights of third persons. *Hunt v. Pasman*, 4 M. & S. 329—Lord Ellenborough.

The court has refused to interpose to control the terms of an order for amendment made by a judge at chambers. *Rex v. Archbishop of York*, 1 Ad. & E. 394; 3 N. & M. 453; and *Doe v. Errington*, 3 N. & M. 646.

*An order to amend may be abandoned.]* After obtaining an order that the party shall be at liberty to amend, it may be abandoned. *Black v. Sangster*, 1 C. M. & R. 521; 5 Tyrw. 171; 3 Dowl. 206.

But notice of his intention to abandon should be given. *Solly v. Richardson*, 6 Dowl. 774.

*Amendment of record at Nisi Prius.]* Where there is no replication on the record, the judge will not at the assizes allow one to be added without the consent of the defendant. *Rowlinson v. Roantre*, 6 C. & P. 551.

A count for goods sold was permitted to be added to the record, which was in the declaration and issue, but not copied into the Nisi Prius record. *Ernest v. Bruce*, 2 M. & Rob. 13.

A plea concluding to the country, with an &c. is sufficient without introducing a formal similiter on the record. *Clark v. Nicholson*, 6 C. & P. 712.

Where a plaintiff had obtained from a judge at chambers an order for leave to amend his declaration on payment of costs, but had not made the amendment, the judge who tried the cause refused to allow the declaration to be amended at the trial, under the 3 & 4 Will. IV. c. 42, s. 23. *Geeckie v. Monck*, 1 Car. & K. 555.

On the trial of an action against officers of a Court of Requests, the Nisi Prius record contained only a plea of not guilty, without the words "by statute" being added. The defendant's counsel wished to amend, by adding the words "by statute" to the Nisi Prius record. The judge would not allow the amendment, as it could not be shown that the words "by statute" were on the defendant's plea;—but semble, that if it could have been shown that the words "by statute" had been in the issue delivered by the plaintiff's attorney, the judge would have allowed the amendment. *Forman v. Dawes*, 1 Car. & M. 127.

*Power of the court to revise an amendment made at Nisi Prius.]* Under the 9 Geo. 4, c. 15, the court cannot revise an amendment made by a judge at Nisi Prius. *Parks v. Adge*, 1 C. & M. 429; 1 Dowl. 643; and *Pullen v. Seymour*, 5 Dowl. 164, Ex.

*Leave to amend after demurrer by a judge at chambers.]* A judge at chambers may give leave to amend after demurrer on payment of only a nominal amount of costs; and the court will not overrule his exercise of discretion, even if they differ from him on the merits of the particular case. *Tomlinson v. Bolland*, 4 Q. B. 642.

*Amendment of declaration after the cause was made a remanet.]* After a cause stood for trial, and was made a remanet, the plaintiff obtained leave to amend his declaration and particulars, the defendant to be at liberty to plead, de novo. To the amended declaration, the defendant paid money into court, which the plaintiff took out:—Held, that the plaintiff was not entitled to the costs of preparing for the trial. *Wilton v. Snook*, 1 Dowl. & L. 964, Ex.

*Amendment of pleadings in a special case.]* A term in a special case, that the court should be at liberty to amend any part of the pleadings as they may think proper, gives no additional power beyond that possessed by a judge at Nisi Prius, under stat. 3 & 4 Will. 4, c. 42, s. 23. *Chapman v. Sutton*, 3 Dowl. & L. 646; 15 Law J., C. P. 166.

*Amendment by adding a plea after judgment on demurrer.]* Where an action had been brought against a surety under 1 & 2 Vic. c. 110, for not rendering his principal, and a plea intended as an excuse for the render had been held bad on demurrer, the court, in the following term, allowed a plea similar in substance to be added, counsel not having been present to ask to amend when judgment was delivered. *Hayward v. Bennett*, 16 Law J., C. P. 95.

*Amendment of issue.]* In general the issue may be amended in any stage of the proceedings. *Cox v. Painter*, 1 N. & P. 581; 6 Ad. & E. 491.

An amendment may be made after notice of trial given and countermanded. *Porin v. Duke of Buckingham*, 8 Moore, 584.

After a cause had been taken down to the assizes and the record withdrawn, the declaration was amended by inserting new counts, varying the statement as to the same cause of action. *Morris v. Evans*, 1 Dowl. 657, Ex.

After issue joined in trover, and a peremptory rule to try, the court refused leave to substitute a count in detinue and add one in debt. *Green v. Mitton*, 4 B. & Ad. 369.

*Amendment of the jury process where the cause is a remanet.]* No judge's order is necessary, under Reg. Gen. H. T. 4 Will. 4, s. 18, for amending the day of the teste and return of the distringas, &c., or of the clause of Nisi Prius, in a cause which has been made a remanet and continues in the paper. It is sufficient if the jury process and Nisi Prius record be re-sealed as before the rule. A judge's order for amendment, as mentioned in the rule, is required only in cases where it was formerly necessary to repass the record. *Wells v. Day*, 8 Ad. & E. 941.

*Amendment of postea.]* The court will not review or question an amendment by a judge of the postea, having no power over his notes. *Sandford v. Alcock*, 10 Mee. & W. 689; 2 Dowl. N. S. 463.

*Amendment of the jury process.]* If there be no return of the distingas juratores, nor any panel returned and annexed thereto, it is fatal on a writ of error. *Rogers v. Smith*, 1 Ad. & E. 772; 3 N. & M. 760.

*Formal amendments not being variances.]* Under the 3 & 4 Will. 4, the date of a writ of summons, when omitted, may be inserted in the record. *Cox v. Painter*, 1 N. & P. 581; 6 Ad. & E. 491.

*An order for amendment cannot be rescinded after receiving costs.]* Where a party has received the costs occasioned by an amendment made in the record under a judge's order, he cannot move to rescind the order. *Simmons v. King*, 2 Dowl. & L. 786; 14 Law J., Q. B. 195.

*Amendment by pauper.]* A pauper plaintiff is not entitled, as of right, to amend without payment of costs. *Foster v. Bank of England*, 2 Dowl. & L. 790; 14 Law J., Q. B. 178.

*Amendment of a judgment, through a mistake by the court.]* The court will amend a judgment in a subsequent term to that in which it was pronounced, where, upon the merits, the party in whose favour it was given was clearly entitled to the amendment, and where the error proceeded from a mistake by the court, as to the sum the party was entitled to recover. *Rogers v. Humphreys*, 4 Ad. & E. 299; 5 N. & M. 511; 5 Law J., K. B. 65.

*Amendments in penal actions.]* The same rules prevail as to amendments in penal actions as are applicable in other actions; and a declaration was allowed to be amended a second time in a penal action, it not appearing that there had been any unnecessary delay. *Jones v. Edwards*, 3 Mee. & W. 218; 7 Law J., Ex. 70; 6 Dowl. 369.

*Amendment of verdict after taxation of costs.]* A verdict may be amended according to the actual finding of the jury; and where a verdict had been entered by mistake upon a certain issue, and the master taxed the costs according to the substantial merits of the cause, and as if the mistake had not been committed; it was held, that the judge before whom the cause was tried should amend the postea, and enter the verdict, so as to remove any incongruity which might appear upon the record, from having the allowance of costs one way and the judgment another. *Ernest v. Browne*, 4 Bing. N. C. 162; 7 Law J., C. P. 145.

*Amendment by order pending a rule to set aside the proceedings for irregularity.]* A rule nisi had been obtained for setting aside a proceeding for irregularity; and, pending the rule, an order was made at chambers for amending the proceeding:—Held, that the order was improperly made, and that the regular course was to apply for a cross rule to amend. *Ball v. Haydon*, 9 Jur. 711; B. C.—Coleridge, J.

## APPEARANCE.

*The record or process may be amended after writ of error brought.]* A court of error will not review the propriety of an amendment made by the court below, in its record or process, though such amendment was made after writ of error brought. *Scales v. Cheese*, 1 Dowl. & L. 657, Ex.

*Amendment of record after judgment in error.]* Semble, that the court out of which a record issues has no power to amend the record after the judgment of a court of error. *Jackson and others v. Galloway*, 2 Dowl. & L. 839, C. P.

*Amendment of information by the crown.]* A rule, on the part of the Attorney-General, to amend an information at the suit of the crown, is absolute in the first instance. *Attorney-General v. Ray*, 11 Mee. & W. 464; 1 Dowl. and L. 278.

*Amendment of declaration after judgment signed.]* Where a writ had been issued, and a declaration delivered, in which a blank was left for the christian name of the defendant, to which he pleaded, and afterwards gave a written consent, signed with his name in full, to a judge's order for payment of the debt, on which judgment was signed, the court a year and a half after the judgment was signed, amended the declaration and judgment by inserting the christian name of the defendant in order to enable the plaintiff to proceed to outlawry. *Wood v. Hume*, 15 Law J., Q. B. 319.

## APPEARANCE.

*Personal service of writ necessary to entitle plaintiff to enter appearance.]* Where the only service of the writ of summons by the officer was, that after two denials, on seeing the defendant at the window, he told him in a loud tone that he had a writ against him at the plaintiff's suit, and holding out the copy, threw it down, and left it in the garden in the defendant's presence:—Held, not a sufficient personal service. *Heath v. White*, 2 Dowl. & L. 40; 13 Law J., Q. B. 218; and *Goggs v. Lord Huntingtower*, 12 Mee. & W. 503. See p. 21.

*What is necessary to entitle plaintiff to enter an appearance.]* The court has no power to grant permission to a plaintiff to enter an appearance for the defendant who has admitted the receipt of the copy of a writ left at his dwelling-house, without the usual affidavit, and the indorsement of the day of service upon the writ. *Russell v. Lowe*, 11 Law J., Ex. 369; 2 Dowl. 233, Ex.

Circumstances under which the court will allow the plaintiff to enter an appearance for the defendant. *Aston v. Greathead*, 2 Dowl. N. S. 547, Ex.; 6 Jur. 1000.

Where in an affidavit in support of a motion to enter an appearance for a defendant upon a return of nulla bona, and non est inventus, it is not stated that a search for an appearance has been made with a view to ascertain whether it has been entered after the return of the writ; the court will consider the affidavit insufficient, and refuse a rule to enter an appearance. *Reid v. Ford*, 2 Dowl. N. S. 944; 12 Law J., Q. B. 249, B. C.—Wightman, J.

*Appearance entered, the defendant having acknowledged by letter the receipt of the writ.]* If after ineffectual attempts to serve defendant personally, a copy of the writ of summons has been left at his place of abode, and he has admitted the receipt of it by letter, plaintiff may have leave to enter an appearance for him, but the application must be supported by an affidavit properly verifying the handwriting of the letter. *Rolfe v. Paget*, 1 B. C. Rep. 78—Wightman, J.

*Appearance cannot be entered without actual personal service.]* The court will not in future allow an appearance to be entered for a defendant, unless there has been actual personal service of the writ; it will not be enough to show that the writ has come to the hands of the defendant. *Goggs v. Lord Huntingtower*, 12 Mee. & W. 503; 8 Jur. 66; 1 Dowl. & L. 599.

*Amendment of appearance.]* A defendant who enters an appearance by a wrong name cannot enter another, but should amend the first. *Bate v. Bolton*, 4 Dowl. 677, Ex.; 2 C. M. & R. 365.

*Appearance entered by the plaintiff.]* An appearance may be entered by the plaintiff long after the writ has issued and after the defendant has given a cognovit. *Richardson v. Daley*, 7 Dowl. 25, Ex.

An appearance entered by the plaintiff after the eighth day, renders one subsequently made by the defendant a nullity. *Davis v. Cooper*, 2 Dowl. 135, Ex.

Where a defendant improperly got possession of the writ of summons, the court allowed an appearance to be entered by the plaintiff, and ordered the defendant to pay the costs. *Brook v. Edridge*, 2 Dowl. 647, Ex.

If a plaintiff irregularly enters an appearance for the defendant, the latter must apply to the court as soon as such steps are taken by the former as show his intention to proceed on the appearance. *Strange v. Freeman*, 5 Dowl. 407.

The entry of an appearance by a plaintiff for a defendant, does not operate as a waiver of an objection to the copy of the writ. *Chalkley v. Carter*, 4 Dowl. 480; 1 Tyrw. & G. 210.

*Appearance by plaintiff, when may be entered.]* A plaintiff has four terms from the service of a writ of summons, within which to enter an appearance for the defendant, if the latter does not appear. *Liddell v. Cranch*, 5 Dowl. 662, K. B.

*Appearance by plaintiff for infant defendant.]* An appearance entered by the plaintiff, under the statute, for an infant defendant, held a ground of error, and set aside with the subsequent proceedings, but without costs. *Stephens v. Lowndes*, 3 Dowl. & L. 295.

Where an appearance had been entered for a minor, and interlocutory judgment obtained against him by default, the plaintiff having no knowledge of the fact of minority, the court will set aside the proceedings on terms. *James v. Aswell*, 11 Jur. 562; B. C.

*Appearance entered by the plaintiff for the defendant.]* Leave cannot be obtained for a plaintiff to appear for a defendant, unless the

court is satisfied that every means to find him has been tried in vain. *Saunderson v. Bourn*, 2 Dowl. 338, Ex.

And what those means were must be disclosed to the court. *Cope-land v. Nevill*, 3 Ad. & E. 668.

*Appearance entered by one partner for another—bad.]* One partner cannot authorize an attorney to enter an appearance and submit to judgment for a co-partner. The co-partner having been taken in execution upon the judgment, and never having been served with a summons, or been cognizant of the action, the court set aside the appearance and other proceedings with costs. *Hambridge v. De la Crouée and another*. 16 Law J., C. P. 85 ; 10 Jur. 1096.

*Appearance entered for a defendant in a lunatic asylum.]* The court allowed an appearance to be entered for a defendant who was confined in a lunatic asylum, upon an affidavit of notice to the keeper, of the plaintiff's intention to enter an appearance for the defendant, and to proceed thereon to judgment and execution, it being contrary to the rules of the asylum to allow a personal interview with the lunatic. *Humphries v. Griffiths*, 6 Mee. & W. 89 ; 9 Law J., Ex. 180.

*Entering appearance where Easter intervenes.]* When the last of the eight days after the service of a writ of summons falls on any day between the Thursday before, and the Wednesday after Easter-day, then the Wednesday after Easter-day is considered the last of such eight days, and the plaintiff may enter an appearance for the defendant on the Thursday. *Harris v. Robinson*, 15 Law J., C. P. 208 ; S. C. nom. *Harrison v. Roberts*, 10 Jur. 458.

*No appearance entered before judgment signed.]* The omission on the part of the plaintiff to appear, as well as the defendant, will render the proceedings altogether null. *Roberts v. Spurr*, 3 Dowl. 551 ; B. C.

But in *Williams v. Strachan*, 1 N. R. 309, which was not referred to by the counsel or the court in the above case, the Court of Common Pleas held, that, if a defendant accept a declaration and act as if an appearance has been entered for him, the court will not afterwards permit him to set aside a judgment for want of an appearance having been entered.

*An appearance should be entered before judgment is signed on a judge's order.]* An appearance should be entered for defendant before judgment is signed in pursuance of a judge's order ; but the omission to do so does not render the judgment a nullity, but is a mere irregularity, and cured by lapse of time. *Hackin v. Hassells*, 1 Dowl. & L. 1006, Ex.

*Appearance after a distringas, and a summons to stay proceedings.]* Where after a distringas had issued, the defendant took out a summons to stay proceedings, on payment of debt and costs, but drew up no rule, the court allowed an appearance to be entered for him under the statute. *Watkins v. Hayward*, 15 Law J., Q. B. 46.

*Appearance improperly entered.]* Where an appearance is improperly entered, it may, on application, be struck out. *Paget v. Thompson*, 3 Bing. 609.

And if not entered according to the 2 Will. 4, c. 39, it may be treated as a nullity. *Warren v. Low*, 7 Dowl. 602.

An appearance entered by the plaintiff's attorney for the defendant is irregular, if it omits the words "according to the statute," as prescribed in the form contained in the schedule to 2 Will. 4, c. 39. *Codrington v. Curlewis*, 9 Dowl. 968.

An appearance having been entered for one of several defendants, who had not been served with process, by the attorney for the other defendants, though without any authority from such defendant, and judgment by default having been signed against all the defendants, held, that the judgment was irregular as against the defendant who had not been served, and was accordingly set aside by the court, but without costs. *Bayley v. Brickland and others*, M.S., Exch. T. T. 1847.

*Appearance irregularly entered, motion thereon.]* Where service of a writ of summons is irregular, and an appearance has been entered and a declaration filed thereon, the defendant should seek to set aside the appearance, and not the declaration. *Brooks v. Roberts*, 14 Law J. 168, C. P.; 2 Dowl. & L. 13; 1 Man. Gr. & Sc. 62.

*To set aside appearance entered sec. stat. and all subsequent proceedings.]* The defendant's affidavit stated, "that he had never at any time been either personally or otherwise served with any writ of summons, or any copy of a writ of summons or other process whatever at the suit of the above-named plaintiff." A rule to show cause was refused; the court intimating that the affidavit must not only state that the defendant has not been served, but that the copy of the writ has not come to his possession. *Billing v. Turner*, M.S., Exch. T. T. 1846.

*Undertaking to appear by an attorney.]* An undertaking by an attorney to appear must be enforced within a reasonable time; and therefore a motion, made in Michaelmas term, to compel an appearance, pursuant to an undertaking given by him on the 8th March, is too late. *Balls v. Strutt*, 7 Law J., Ex. 7.

*Appearance sec. stat. after appearance by defendant.]* The entering of an appearance sec. stat. after an appearance duly entered by the defendant is an irregularity only, and not a nullity. A defendant, therefore, who wishes to set aside such appearance, must do so before the plaintiff has taken another step. And where a judge's order was obtained by a defendant for setting aside such appearance, but not served until after the plaintiff had signed judgment for want of a plea:—Held, that the defendant had waived the irregularity, and that the plaintiff's proceedings were regular. *Mapel v. Woodgate*, 10 Jur. 839, B. C.; 1 B. C. Rep. 79.

*Appearance sec. stat. by a plaintiff in person.]* A plaintiff in person having entered an appearance sec. stat. for the defendant, and proceeded to judgment; on a motion to set aside the appearance and

## ARBITRATION.

the proceedings thereon, and for the defendant to be at liberty to appear :—Held, that the appearance was regular and the court refused a rule. *Smith v. Wedderburn*; 10 Jur. 952; 16 Law J., Ex. 14.

*Appearance entered sec. stat. and subsequent appearance by defendant.]* If the defendant neglects to enter an appearance to the writ within eight days, and the plaintiff enters an appearance for him, and then the defendant enters an appearance and gives notice of it, the plaintiff may proceed as if no such appearance had been entered, and may sign a judgment without a demand of plea. *Davis v. Cooper*, 2 Dowl. 135, Ex.

## ARBITRATION.

*Arbitrators.]* There is no ground for the distinction between legal and unlearned arbitrators. Each is equally conclusive judge of matters referred to him, whether of law or of fact. *Jupp v. Grayson*, 5 Tyrw. 150; 4 Law J., Ex. 8; 1 C. M. & R. 523.

*Arbitration—notice of meetings.]* One of the parties to the deed of submission objected to the award, on the ground that he had no notice of two meetings, at the first of which no business was transacted, and the meeting adjourned pro formâ; and at a second meeting, at which he attended and delivered in a protest against the proceedings, upon a ground different from the want of notice :—Held, that the want of notice of the first meeting was, under the circumstances, no ground for setting aside the award; and that the party had, by his protest, waived the want of notice of the second meeting. *In re Morphett*, 10 Jur. 546; B.C.—Coleridge, J.

*If arbitrator neglects to enlarge the time for making his award, the court cannot.]* Where the time for making an award had, through the neglect or inadvertence of the arbitrator been allowed to expire in April, 1839; and no subsequent step was taken by either party in the reference, until January, 1841, the court refused an application made by the defendant in the cause referred, and opposed by the plaintiff, to enlarge the time for the arbitrator to make his award. The court does not possess the power, under 3 & 4 Will. 4, c. 42, s. 39, to compel parties to proceed with a reference, the time for making the award having expired, where the arbitrator has had the power to enlarge the time, and has not exercised it. *Lambert and others v. Hutchinson*, 10 Law J., C. P. 213.

*Arbitrator refusing to certify, under 3 & 4 Vic. c. 24, application to the court.]* An action having been brought to try a right, was referred by an order of reference, which contained a clause that the arbitrator was to have all the powers to certify that a judge would have had, and also, that the court might, if they thought fit, send the award back to be amended. The arbitrator having found for the plaintiff, with one farthing damages, but having refused to certify under 3 & 4 Vic. c. 24, s. 2, that the action was really brought to try a right, this court refused to send back the award to be amended. *Perry v. Dunn*, 12 Law J., Q. B. 351.

*Arbitration, costs allowed although no certificate under 3 & 4 Vic. c. 24.]* An action on the case for diverting a watercourse was, after issues joined on pleas of not guilty, and denying the plaintiff's right to and user of the water, referred by a judge's order to arbitration, by which the costs of the suit were to abide the event of the award, but no power was given to the arbitrator to certify under 3 & 4 Vic. c 24, s. 2. The arbitrator found all the issues for the plaintiff, and assessed the damages on the first issue at 6d. The plaintiff was held to be entitled to full costs. *Griffiths v. Thomas and another*, 15 Law J., Q. B. 336.

*Authority of arbitrator to raise any point of law.]* Where, by the terms of the order of reference, an arbitrator is to be at liberty to raise any point of law for the opinion of the court, he is not bound to do so ; such a clause is only an enabling one, and not compulsory. *Wood v. Hotham*, 5 Mee. & W. 674.

Without any clause in the order to that effect, an arbitrator has power to state a case for the opinion of the court. *Ib.*

An arbitrator cannot without leave reserved in the submission state a case for the opinion of the court ; but where by the terms of the order of reference he is empowered to state any point for the opinion of the court, "at the request of either party," it is not sufficient to state, as an objection to the award, that he has not raised such points as he was requested by the parties to raise, but it should be distinctly specified what such points were. *Bradbee v. The Governors of Christ's Hospital*, 11 Law J., C. P. 209.

*Documentary evidence received by arbitrator.]* On an arbitration, the plaintiff tendered in evidence certain books, containing entries made by himself, which being objected to as inadmissible, the arbitrator stated that the same strictness was not required as on a trial at Nisi Prius, and received the books in evidence :—Held, no ground for setting aside the award for misconduct on the part of the arbitrator. *Hagger v. Baker*, 14 Mee. & W. 9 ; 14 Law J., Ex. 227.

On a motion summarily to enforce an award, the conduct of the arbitrator will not be gone into by the court. *Manley v. Bray*, 11 Jur. 521.

*Arbitrator not bound by particulars of demand, unless same be brought to his notice.]* A cause was referred at Nisi Prius, and a verdict entered for the plaintiff by consent, for the damages in the declaration, which exceeded the amount claimed in the particulars of demand. The arbitrator awarded that the verdict should stand at the amount for which it was entered :—Semble, that the particulars of demand were not necessarily before the arbitrator, and that if the defendant intended to limit the plaintiff's demand to the amount claimed by the particulars, he ought to have brought the particulars before the arbitrator. *Kenrick v. Phillips*, 7 Mee. & W. 415.

*Umpire must examine witnesses if required.]* Where matters in dispute are referred to arbitrators, and, in case they shall not agree, to an umpire, it is the duty of the umpire to examine the witnesses, and the court will set aside his award, after an application to him for that

purpose, and a refusal, unless it appear distinctly that both parties have consented to his receiving the evidence from the arbitrators, and making his decision on that alone. *In re Salkeld and others, assignees of Stringer, a bankrupt*, 10 Law J., Q. B. 22.

*Arbitration, refusal of umpire to hear evidence.]* If an umpire either refuse to rehear the evidence already given before the arbitrators, or to hear further evidence, the award may be set aside. And it is no waiver of the objection, that the party did not insist on it at the time he attended to take up the award. *In re Jenkins and Leggo*, 11 Law J., Q. B. 71.

*An arbitrator's authority is confined to the terms of reference.]* Where a cause only was referred to an arbitrator, in which the plaintiff claimed by his particulars of demand upon the balance of an account a sum of 34*l.* 17*s.* 4*½d.*, and the defendant paid into court the sum of 9*l.* 3*s.* 3*d.*, but the arbitrator, upon a supposition that he was entitled to settle all matters in difference between the parties, awarded to the plaintiff the sum of 33*l.* 7*s.* 10*d.*, the court set aside the award, upon the ground that the arbitrator had exceeded his authority. *Atkinson v. Jones*, 1 Dowl. & L. 225, Q. B.

And where the parties to an order of reference mutually agreed to strike out the usual clause, giving the arbitrator power to examine the parties. At the hearing, the plaintiff's attorney tendered the plaintiff as a witness, and he was examined by the arbitrator. The defendant's counsel objected to the admission of the plaintiff, but as the arbitrator decided against him, he proceeded to cross-examine the plaintiff, and went into his case. On a motion to set aside the award for irregularity:—Held, that the examining of the plaintiff under those circumstances, was a good ground for setting aside the award; and that the objection was not waived by the defendant going on with the arbitration.

Semblé, if the defendant had tendered himself as a witness to support his own case, that would have been a waiver. *Smith v. Sparrow*, 16 Law J., Q. B. 139.

*Parties to submission to arbitration.]* By a judge's order, made in a cause of A *v.* B, it was ordered, by consent of the parties, and of C, (a stranger) that a verdict should be entered for the plaintiff, damages 50*l.* subject to the award of an arbitrator, who was to settle all matters in difference between the parties in the action, and also between B and C, the arbitrator awarded that all proceedings in the action should cease, &c.; and that the plaintiff had a good cause of action against the defendant in the said cause, and was entitled to a verdict therein, and assessed the damages at 40*s.*, “to be paid by the defendant to A and C, who had consented to become a party to the said cause.” An action being brought by A and C *v.* B on the award:—Held, on demurrer, that the award was good. *Hawkins and Cole v. Benton*, 15 Law J., Q. B. 138.

*Arbitrator may administer the oath to witnesses although the order omit to state so.]* By an order of reference at Nisi Prius, it was directed that the witnesses should be sworn before a judge or a com-

missioner :—Held, that this clause did not exclude the general power of the arbitrator to administer an oath to such witnesses under 3 & 4 Will. 4, c. 42, s. 11 ; *Hodson v. Wise*, 4 Mee. & W. 536 ; 8 Law J., Ex. 71.

*Discretion of arbitrator to examine witnesses on oath.]* A cause was referred by order of Nisi Prius, which stated that “the arbitrators should be at liberty, if they should think fit, to examine the parties and their respective witnesses on oath :”—Held, that it was discretionary with the arbitrators whether they would examine the witnesses on oath or not, and that it was no objection to their award that the witnesses were examined without being sworn, although the party against whom the award was made required, at the time, that they should be sworn. *Smith v. Goff*, 14 Mee. and W. 264 ; 3 Dowl. & L. 47.

*Reception of evidence in the discretion of the arbitrator.]* The question as to what evidence ought to be received being one of law, the court will not revise it. *Symes v. Goodfellow*, 2 Bing. N. S. 532 ; 2 Scott, 769 ; 4 Dowl. 642.

It is no ground for setting aside an award that the arbitrator has received improper evidence. *Henley v. Halling*, 1 H. & W. 2.

*Submission to arbitration stating no time for making award.]* By a deed of submission, certain matters in difference were referred to the award of arbitrators, and the parties thereby covenanted to perform their award of and concerning the premises, or anything in any wise relating thereto, and also of and concerning all actions, &c., sums of money, demands, &c., at any time theretofore had, commenced, sued, prosecuted, or depending between the parties, so as the award was made in writing, under the hands of the arbitrators making the same ; but no time within which the award was to be made was limited by the deed. By a memorandum, not under seal, indorsed on the deed after its execution, and signed by the arbitrators, but not by the parties, the arbitrators agreed that the award should be delivered on or before the 3rd of November :—Held, that the arbitrators could not in the absence of any power to that effect in the deed, limit the time for making their award, so as to render an award made after the 3rd November invalid. *In re G. Morphett and another*, 14 Law J., Q. B. 259.

*A submission to arbitration may be made a rule of court, although subsequent proceedings are void.]* It is no objection to the making of a submission to arbitration a rule of court, that all the proceedings taken under such submission are null and void. *Anon.* 10 Jur. 525, B. C.

*Submission to arbitration, making of a rule of court.]* Where two parts of a deed of submission to arbitration were executed, and the arbitrator endorsed the enlargements of the time for making his award on one part, the court compelled the party in whose possession that part was to make it a rule of court. *Smith v. Blake*, 8 Dowl. 130, Q.B.

A submission cannot be made a rule of court without the original;

and if in the possession of the adverse party, a rule will be granted to compel him to produce it. *Lord Boston v. Merham*, 8 Dowl. 867, Ex.

An agreement of reference contained a clause for making such agreement a rule of court. The award being published, and a motion about to be made for setting it aside, the party interested in opposing such motion refused to produce the agreement for the purpose of its being made a rule. The court, on motion, in the term next after the making of the award, permitted a copy of the agreement to be made a rule of court, and granted thereupon a rule nisi for setting the award aside. *In re Plews*, 6 Q. B. 845.

*Agreement of reference, proof of.]* An agreement of reference, to which the plaintiff was a party, was attested by two subscribing witnesses. Upon an issue joined, in which the plaintiff denied the agreement of reference:—Held, that the rule of court, by which, pursuant to the agreement, it was made a rule of court, and which recited and incorporated it, was not the proper evidence of it, but that it should have been proved by one of the subscribing witnesses. *Bernie v. Read*, 14 Law J., Q. B. 247.

*Arbitrator's certificate for special jury, when too late.]* An order of reference, containing a provision that the arbitrator should have all the powers of a judge at Nisi Prius, and should make his award before the first day of Michaelmas term. The award was made on the 6th August; and after the first four days of Michaelmas term the arbitrator indorsed on the record a certificate that the cause was one proper to be tried by a special jury:—Held, that the certificate was given too late. *Geeves v. Gorton*, 10 Jur. 272, Ex.

*Certificate on arbitration given in vacation—signing judgment.]* Where a verdict is taken at Nisi Prius by consent, subject to the certificate of an arbitrator, and the certificate is given in vacation, after more than four days from the return day of the distringas juratores, the certificate has relation back to the date of the verdict, and the successful party is entitled to sign judgment immediately, without waiting until the first four days of the next term have expired. *Cromer and another v. Churt*, 15 Law J., Ex. 263.

*Revocation of submission.]* Bankruptcy is no revocation of a submission to arbitration. *Hemsworth v. Brian*, 2 Dowl. & L. 844; 14 Law J., C. P. 134.

*After submission to arbitration a party cannot move in arrest of judgment.]* Where an order of reference contains a clause restraining the parties from bringing a writ of error, they are precluded from moving in arrest of judgment. *Chownes v. Brown*, 2 Dowl. and L. 706; 14 Law J., Ex. 219.

*Arbitrator's fees and expenses of award.]* The court has no general authority to make an order on arbitrators, or their attorney, to refund so much of the fees as they have received, as exceeds the amount allowed by the master on taxation. *Dossett v. Gingell*, 10 Law J., C. P. 183.

## ARREST.

*Arrest for a larger sum than subsequently found to be due. Costs.]* A defendant will be entitled to his costs under the 43 Geo. 3, c. 46, s. 3, if he has been arrested for a larger sum than that found to be due, when the plaintiff ought to have known that he had no legal proof in support of his claim to the extent for which the arrest took place. *Robinson v. Whitehead*, 6 Dowl. 292, B. C.

Though, where there is a reasonable doubt in law as to the right of the plaintiff to recover part of his demand:—Held, that the defendant was not entitled to claim his costs under the 43 Geo. 3, c. 46; *Stovin v. Taylor*, 1 Dowl. 697, K. B.

And the statute does not apply where a cause is referred to arbitration. *Keene v. Deeble*, 3 B. & C. 491.

*Personal exemption from arrest.]* An Irish peer, who has voted in the election of representative peers, and whose vote has been allowed by the House of Lords, is privileged from arrest. *Coates v. Hawarden*, 7 B. & C. 388; 1 M. & R. 110.

A defendant, who has voted in the character of a Scotch peer, is privileged from arrest. *Digby v. Stirling*, 8 Bing. 55.

A chaplain to the king is privileged from arrest. *Byrn v. Dibdin*, 1 C. M. & R. 821; 5 Tyrw. 357; 3 Dowl. 448; and *Winter v. Dibdin*, 13 Mee. & W. 25; 2 Dowl. & L. 211.

A lord of the bed-chamber in the royal household is privileged from arrest. *Aldridge v. Lord Tullamore*, 3 Dowl. 450, n.

The privilege from arrest applies to a page of the second class in ordinary to the queen. *Reynolds v. Pocock*, 4 Mee. & W. 371.

And to the candle and fire-lighter to the yeoman of the guard. *Hatton v. Hopkins*, 6 M. & Sel. 271.

But, on motion, the court refused to discharge out of custody “the Somerset herald,” leaving him to his writ of privilege. *Leslie v. Disney*, 1 C. M. & R. 578; 5 Tyrw. 181.

A clergyman on his way to the altar is privileged from arrest. *Goddard v. Harris*, 7 Bing. 320.

*Exemption from arrest, as to locality.]* Though an arrest within the precincts of the Tower is irregular, yet the party entitled to complain is only he whose franchise has been invaded. *Bell v. Jacobs*, 4 Bing. 523.

*A barrister on circuit exempt from arrest.]* The circuit held continuous throughout, and not merely during the assizes at a particular place, and a barrister attending privileged from arrest during the entire circuit; held also that a capias utlagatum, at the suit of a party, is to be deemed civil and not criminal process. *Reg. v. Sheriff of Kent*, 2 Car. & K. 197; and *Reg. v. Sheriff of Oxfordshire*, 2 Car. & K. 200.

*Discharge from arrest, when application should be made.]* An application to set aside an arrest made on a judge's order, under 1 & 2 Vic. c. 110, s. 3, must be made promptly; and, as it seems, within the time for putting in bail.

In order to excuse the delay, on the ground of a previous application at chambers, the rule must be drawn up on reading the summons, or it must be shown by affidavit. *Sugars v. Concanen*, 5 Mee. & W. 30.

*Discharge from arrest, party attending court.]* Where a person attending court has been wrongfully arrested, he may be discharged either by the court which he was attending, or by the court out of which the process issued on which he was arrested. *Ex parte Watkins*, 6 Law J., Ch. 225; 8 Sim. 377.

A party who had formerly been a solicitor, but had disposed of his business, was arrested as he was returning home from the House of Lords, where he had been attending an appeal case as agent. The cause of arrest was the non-payment of certain costs which he had been ordered to pay by the Court of Chancery:—Held, that he was entitled to be discharged from custody, and that although he had not taken the nearest road to his residence, had stopped to speak to several persons on the road, and had gone into a public-house for the purpose of taking refreshment. *Ib.*

An attorney, who had been arrested on a ca. sa., applied to be discharged on an affidavit, in which he stated, that having professional business to transact in several causes in the Courts of Exchequer and Common Pleas, he was proceeding through the city of London, in his way to Westminster Hall, for that purpose; that on arriving at the Bank of England, he recollects that he had some business to transact with a client, whom he might probably meet at the Auction Mart; he, therefore, called there, in his way to Westminster Hall, and there saw his client, and was about to leave him and proceed to Westminster Hall, when he was arrested:—Held, that he was not entitled to be discharged on this affidavit. *Strong v. Dickinson*, 1 Mee. & W. 488; 5 Law J., Ex. 231; 5 Dowl. 99; 1 Tyrw. & G. 683.

*Discharge from arrest, the affidavit being insufficient.]* Where a defendant has been arrested by a judge's order, under 1 & 2 Vic. c. 110, s. 3, obtained on insufficient affidavits, the application for his discharge should be by motion to set aside the judge's order, not the capias. *Hopkins v. Salembier*, 5 Mee. & W. 423; 7 Dowl. 493.

*Arrest on a ca. sa. after the death of the plaintiff.]* On a motion to discharge the defendant out of custody on the ground of his having been arrested on a ca. sa. after the death of the plaintiff:—Held, that the same rule applies to a ca. sa. as to a fi. fa., and that the arrest was regular. *Ellis v. Griffith*, Ex. M. T. 1846; 10 Jur. 1014; 16 Law J., Ex. 66.

*Arrest of a defendant by a wrong name.]* A plaintiff arrested a defendant by a wrong name, but it appeared that he had made inquiries at a banker's where defendant kept an account, who told him they believed the defendant's name to be that in which he was arrested. The court held the inquiry sufficient within the 32 Reg. Gen. H. T. 2 Will. 4, so as not to entitle the defendant to his discharge. *Rosset v. Hartley*, 5 N. & M. 415.

*Re-arrest under the same writ.]* A party who has been arrested

under colour of a ca. sa., and discharged by a judge's order, on the ground that the sheriff's officer had no warrant at the time of the taking, may be arrested again under the same writ. *Plomer v. Ball*, 5 Ad. & E. 823.

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*An attachment cannot be moved for in person.]* This motion is in the nature of a criminal proceeding, and must be made by counsel, so as to give a sanction, and show that there is some ground for the application. *Fenn, ex parte*, 2 Dowl. 527, Q. B.

*Rule for an attachment, whether nisi or absolute.]* A rule for an attachment for any other cause than the non-payment of money pursuant to the master's allocatur, or against a sheriff for not returning a writ, is only nisi in the first instance. *Richmond v. Bowdidge*, 4 Dowl. 749, Ex.; 1 Mee. & W. 40.

*The copy of a rule for an attachment must be correct.]* Where a copy of a rule mis-spelled the defendant's name and also the master's name, the defendant was discharged. *Rex v. Calvert*, 2 C. & M. 189; 2 Dowl. 276; 4 Tyrw. 77.

*A rule for an attachment is not allowed to be returnable at chambers.]* On motion for an attachment for non-payment of costs, pursuant to an award, it being near the end of term, application was made that it might be heard at chambers. The court refused it as quite unusual. *Fall v. Fall*, 2 Dowl. 88, Ex.

*Service of a rule for an attachment.]* There must be personal service of a copy of the rule, merely showing the original will not do. *Parker v. Burgess*, 3 Nev. & M. 36; and *Dalton v. Tucker*, 5 Dowl. 550.

The original need not be placed in the party's hands. *Calvert v. Redfern*, 2 Dowl. 505, Q. B.

But it must be shown. *Danes v. Sherlock*, 7 Dowl. 592.

And to found an attachment for not obeying a judge's order, the rule of court having been served is sufficient without service of the order. *Greenwood v. Dyer*, 5 Dowl. 255, B. C.

Where it appears the defendants "were shy and difficult to be met with," personal service was not dispensed with. *Garland v. Goulden*, 2 Y. & J. 89.

If a party appear on a rule for an attachment coming on, he waives the want of regular service. *Levi v. Duncombe*, 1 C. M. & R. 737; 3 Dowl. 447.

To ground an attachment against an attorney there must be personal service of the rule. *Wilkinson v. Pennington*, 3 Scott, 401; 6 Dowl. 183.

An affidavit stating that the rule for an attachment was "left with him at his house" is sufficient. *Short v. Smith*, 8 Dowl. 584, C. P.

To make a rule absolute for an attachment for non-payment of costs, the service must be strictly personal. *Birkett v. Holme*, 4 Dowl. 556.

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Where a rule for an attachment, which has been served too late for cause to be shown against it, when due is enlarged to the following term, there must be a personal service of the enlarged rule. *Dixon v. Willis*, 6 Law J., Ex. 144.

The court will not make a rule nisi for an attachment absolute, unless there be a personal service, or it appears that it has been seen in the possession of the party sought to be served; even although he be an attorney of the court, and circumstances are sworn to, that leave no doubt that he is keeping out of the way for the purpose of avoiding service, and the applicant has no other remedy. *Re Pyne*, 1 Dowl. & L. 703, Q. B.

Personal service of a rule for an attachment may be dispensed with in cases where there is no other remedy, and it is quite clear that all attempts to effect personal service have been purposely evaded. *In re Whalley*, 9 Jur. 995, Ex.; 15 Law J., Ex. 4; 14 Mee. & W. 731.

On an application to enlarge a rule for an attachment for non-performance of an award, and to substitute special service thereof in lieu of personal service:—The court held, that personal service is never dispensed with in a rule for an attachment where there is another remedy, as there is in this case, by an action on the award. *Budd v. Powting*, MS. Exch. H. T. 1847.

*Service of rule nisi for an attachment for non-performance of award.]* Where service of the rule nisi for an attachment for non-payment pursuant to an award had been on defendant's wife, and there was reason to believe the defendant himself had kept out of the way, and had ultimately received the rule, personal service was dispensed with, and the rule made absolute on service on the wife. *Potter v. Williams*, 6 Jur. 508, B. C.—Coleridge, J.

*Personal service of a rule may be dispensed with.]* Where a person keeps out of the way to avoid being served personally with a rule, preparatory to obtaining an attachment against him, and it is clearly made out to the satisfaction of the court, the court will dispense with personal service. *Green v. Prosser*, 2 Dowl. 99, Ex.

*Renewal of a motion for an attachment.*—Where a party having applied for an attachment for non-payment of costs, which was refused on the ground of the improper service of a power of attorney, but leave being given to apply again, renewed the application after making a proper service of the power of attorney, and a fresh demand of costs, which the plaintiff refused to pay:—Held, that the application might be made, the second demand and refusal being a fresh contempt, and amounting to new matter. *Dixon v. Oliphant*, 15 Mee. & W. 152; 15 Law J., Ex. 106; 3 Dowl. & L. 485.

*An attachment may issue against one of several defendants.]* Where a rule for taxing costs is against several defendants, an attachment against one only for non-payment will not be set aside as irregular. *The Queen v. Dobson*, 15 Law J., Q. B. 376; 10 Jur. 905.

*Attachment for non-delivery of papers.]* There must be a rule for

the delivery of the papers before a rule nisi for an attachment will be granted. *Roscoe v. Hardman*, 5 Dowl. 157.

A demand on an attorney to deliver up papers must be made by a person duly authorised, and that stated to the attorney, to ground an attachment for refusal. *Doe d. Hickman v. Hickman*, 8 Dowl. 833, C. P.

*Attachment for non-payment, &c. not waived by other proceedings.]* An arbitrator having by his award ordered the defendant to pay to the plaintiff a sum of money, the plaintiff filed an affidavit of debt in the Court of Bankruptcy, under stat. 1 & 2, Vict. c. 110, and the defendant gave a bond, with sureties, conditioned for payment of the money, but omitting the alternative in the statute, of rendering himself to custody: —Held, that the plaintiff's having adopted this proceeding did not preclude him from applying for an attachment for non-performance of the award and rule of court thereon. *Mendell v. Tyrrell*, 9 Mee. & W. 217.

*Attachment for non-payment of costs, when may be moved for.]* It is no ground of objection to an application for a rule absolute in the first instance for an attachment for non-payment of costs on the master's allocatur, that the rule ordering the payment of the costs, and the allocatur thereon have only been served upon the party on the day when, and immediately before, such application is made. *Steel v. Compton*, 9 Jur. 181, B. C.—Patteson, J.

*Attachment for non-payment of money—demand by power of attorney.]* Where money is ordered to be paid to a certain person not an attorney or his agent, a demand must either be made by himself or some one authorised by a power of attorney. *Brown v. Jenks*, 4 Dowl. 581.

To bring the party into contempt for non-payment of money, pursuant to rule of court, if the demand is made by power of attorney, a copy of the power must be left at the time of demand. *Doe d. Cope v. Johnson*, 7 Dowl. 550, B. C.; and *Rex v. Packwood*, 2 Dowl. 571, B. C.

A rule nisi for an attachment will not be granted for non-payment of money under a rule of court, unless the rule has been personally served, and the demand made by a person authorised to receive the money. *In re Richardson*, 11 Jur. 309.

*Attachment for non-payment on master's allocatur between attorney and client.]* The rule for an attachment for non-payment of costs pursuant to the Master's allocatur between attorney and client is nisi in the first instance. *Spragg v. Willis*, 2 Dowl. 531.

A rule for an attachment for non-payment of costs between attorney and client is nisi. *Green v. Light*, 3 Dowl. 578, B. C.

And it is only a rule to show cause where the Master had to decide on matters of account as well as costs. *Rex v. Spraggs*, 2 N. & M. 678.

*Attachment for non-payment of costs.]* The rule for an attachment for non-payment of costs on the Master's allocatur is absolute in the

first instance, although against a feme covert. *Reg. v. Johnson*, 1 Dav. & Mer. 231; 5 Ad. & Ell., N. S. 335.

An attachment for costs can only include the costs on the allocatur, and not subsequent costs. *Regina v. Jameson*, 8 Dowl. 790; 6 Mee. & W. 603.

Although husband and wife may be parties to a suit, an attachment for non-payment of costs will not be granted against the latter. *Doe d. Allanson v. Canfield*, 6 Dowl. 523.

An attachment for non-payment of costs can only be granted upon an affidavit of personal service. *Stanwell v. Tower*, 2 Dowl. 673.

*Costs of an attachment.]* All charges incidental to the attachment, and the removing of the contempt, come within the words "costs" when given on an attachment. *Tyler v. Campbell*, 7 Scott, 116.

*Payment or tender to the plaintiff must be personal.]* Where a judge directs a tender to be made to the plaintiff, to ground an attachment, a tender to his attorney will not do. *Evans v. Millard*, 3 Dowl. 661, Ex.

*Demand of payment by the attorney, the agent being named on the record.]* Where money is to be paid to the party or his attorney, a demand may be made by the attorney though the agent's name be on the record. *Dennett v. Pass*, 3 Dowl. 632; 1 Bing. N. S. 638.

*Demand of payment under an allocatur.]* The demand may be made by the attorney in the cause though the master had not in his allocatur directed payment to him. *Cox v. Salman*, 2 W. & M. 127.

And the attorney need not be authorised by power of attorney to make the demand. *Mason v. Whitehouse*, 6 Scott, 246; 4 Bing. 692; 6 Dowl. 602.

Although costs are to be paid to the plaintiff, a demand by his attorney is sufficient. *Inman v. Hill*, 4 M. & W. 7; 6 Dowl. 666.

If, after demand, the amount be reduced, a fresh demand is requisite. *Spiry v. Webster*, 1 Dowl. 696.

After an order obtained for taxation, under 6 & 7 Vic. c. 73, s. 43, before an attachment can issue, an order for payment of the amount certified must be made and have been disobeyed. *Woodhouse, in re*, 2 Man. Gr. & S. 290.

A rule for an attachment against an attorney for non-payment of money, pursuant to his promise, cannot be obtained; a previous rule, requiring the payment of money, must have been made absolute. *Twiss v. Fry*, 5 Dowl. 157.

An attachment for non-payment of money will not be granted if the affidavit on which it is sought to bring the party into contempt describe the rule of court as an "order." *In re Turner*, 6 Dowl. 6.

*Attachment for non-payment of money under an order.]* In order to bring a person into contempt for not paying money according to an order, a demand of the money must be made after the order has been made a rule of court. *Chilton v. Ellis*, 2 Dowl. 338, Ex.

*Attachment for non-performance of an award.]* On showing cause

against a rule for an attachment for non-performance of an award, reference cannot be made to the pleadings in the cause, without an affidavit identifying them with the award. *Rowe v. Sawyer*, 7 Dowl. 691.

To warrant a motion for an attachment for non-performance of an award, the order or submission must appear to have been previously made a rule of court. *Mayor of Bath v. Pinch*, 4 Scott, 299.

*Attachment for non-payment of costs on an allocatur on judgment in ejection.]* An attachment was granted for the non-payment of the costs of an ejection which had been taxed under the consent rule, where the rule and allocatur were served on the defendant, and a demand of the costs generally, without mentioning any specific sum, made at the same time. *Doe d. Tew v. Ballingham*, 15 Law J., Q. B. 220.

*Attachment for disobeying a judge's order.]* An attachment for disobeying a judge's order does not lie until it has been made a rule of court. *Baker v. Rye*, 1 Dowl. 689, Ex.

*Attachment against a plaintiff for not obeying a judge's order.]* Where a judge's order having been obtained under 2 Will. 4, c. 39, s. 17, in a qui tam action, for a particular of the plaintiff's residence, &c., and he had furnished his attorney with a false statement:—Semblé, the court had authority to issue an attachment, although the plaintiff is not named in the statute, but only the attorney. Wherever parties in any way obstruct, pervert, or defeat the authority of the court, they are guilty of a contempt. *Smith q. t. v. Bond*, 13 Mee. & W. 594; 2 Dowl. & L. 460; and 14 Law J., Ex. 114.

*Attachment against a prisoner.]* A prisoner in the custody of the marshal cannot be brought up to be charged with an attachment; but it should be lodged with the sheriff, to take him upon his discharge upon the former process. *Boucher v. Simms*, 2 C. M. & R. 392; 4 Dowl. 173.

*Attachment for contempt of court, form of warrant.]* An adjudication of contempt by any of the superior courts of common law, is not a necessary part of a committal for a contempt; and an attachment is valid without it. And the same principle is applicable to the Court of Chancery, as Lord Lyndhurst recently decided after an inquiry into precedents. *Ex parte Van Sandau*, 1 Phillips, 605.

*Attachment against the sheriff for not returning writ.]* In order to obtain an attachment against a sheriff for not returning a writ pursuant to a judge's order, the original order must be shown at the time of serving a copy of it. *Granger v. Fry*, 5 Dowl. 21.

Where a plaintiff is entitled to an attachment, pursuant to Reg. Gen. H. T. 3 Will. 4, against the sheriff for not obeying a judge's order in vacation, to bring in the body, although the defendant is afterwards rendered in vacation, he is bound to apply for the attachment promptly in the following term. *Rex v. Sheriff of Middlesex*, 5 Dowl. 245.

Where the sheriff took a bail-bond with one surety only, and after-

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wards made a day's default in returning the writ, the court set aside an attachment obtained against him, on payment of costs.

Semblé—aliter of an attachment for not bringing in the body. *Rex v. Sheriff of Surrey*, 2 C. M. & R. 698; 1 Tyrw. & G. 32.

The court will not entertain an application to set aside a regular attachment against the sheriff until bail have justified, or the defendant has been rendered. *Rex v. Sheriff of Lincolnshire*, 5 Law J., Ex. 42.

The affidavit in support of a rule for discharging an attachment against the sheriff, &c., in pursuance of the rule H. T. 7 Will. 4, must state that the application is made "for his indemnity only." *Geach v. Atkinson*, 7 Law J., Ex. 314.

*Attachment against a sheriff for non-payment of money.]* A rule for an attachment against the sheriff, for the non-payment of money directed to be paid by an order made a rule of court, and of the costs of the rule is only in the first instance a rule to show cause. *Hatfield v. Hatherfield*, 1 Dowl. & L. 809, C. P.

*Attachment against the defendant's attorney for not appearing on subpoena.]* The defendant's attorney had been served by the plaintiff with a subpoena duces tecum, at Chelsea, just before ten o'clock at night, to attend at Westminster next morning at nine o'clock, to produce certain documents which were at his office in Symond's Inn. He was clerk to the board of guardians, and vestry clerk, and in his duty as such, attended that morning a meeting which had been previously fixed, believing that he would still be in time to attend the trial; but a special jury case suddenly terminating, the cause was called on about ten o'clock in the morning, and the record in consequence of his absence withdrawn. The court made a rule absolute for an attachment against him. *Jackson v. Seager*, 2 Dowl. & L. 13, Q. B.

*Attachment against a witness for not obeying a subpoena.]* On a motion for an attachment against a witness for not obeying a subpoena, it is not necessary that the witness should have been called in court upon his subpoena, if it clearly appear from the affidavits that the witness was not in attendance at the trial. *Goff v. Mills*, 2 Dowl. & L. 23, Q. B.

In order to obtain an attachment against a witness, the original writ of subpoena must be shown at the time of the service of the copy.

Where the witness, a managing clerk to an attorney, was served with a subpoena in court about an hour before the trial came on, and whilst he was attending to the winding up of a cause in which he was engaged, and which stood next but one on the list before the cause in question:—Semblé, that this was not a sufficient service to warrant the granting an attachment. *Pitcher v. King*, 2 Dowl. & L. 755, Q. B.

The court refused an attachment against a witness for not appearing at a trial, in obedience to a writ of subpoena, where it appeared that he had not been guilty of any wilful misconduct, and where the only fact which he was subpoenaed to prove could have been proved by another witness, who was in attendance at the trial under a subpoena for that purpose, but who was not called. *Chapman v. Davis*, 11 Law J., C. P. 51.

A subpœna to attend the trial of a cause on the commission day extends to the whole assizes; and it need not require the attendance of the party "from day to day, till the cause is tried."

The court will not presume a contempt; and therefore, where an excuse, even ambiguously worded, is offered for the non-attendance of a witness, the court will leave the party to his remedy by action, or motion for a new trial.

In answer to a motion for an attachment, the witness swore, that he had been for some time in bad health; that on the morning of the trial he was unwell, and did not rise until ten o'clock, that he shortly afterwards went to his office, which lay in the road to the court, when, upon inquiry, he found the cause had been tried:—Held, a sufficient excuse, the witness denying any intention to treat the court with disrespect.

Semble, in answer to a motion for an attachment, it is not sufficient to show that the testimony of the witness was immaterial. *Scholes v. Hilton*, 11 Law J., Ex. 332.

It is not competent for a person served with a subp. duc. tec. to show the instrument he was required to produce was immaterial in the cause, in answer to a rule for an attachment. *Doe d. Butt v. Kelly*, 4 Dowl. 273.

A witness is not bound to obey a subpœna altered by the attorney from the sittings from which it was originally sued out to subsequent sittings, without being re-sealed. Whether a subpœna has been served in a reasonable time before the trial is matter for the court. Service on a person living close to the place of trial at half-past eleven o'clock in the morning, for a cause called on at two o'clock, is not in sufficient time. *Barber v. Wood*, 2 M. & R. 172.

An affidavit to ground a rule nisi for an attachment for not obeying a subpœna must state that at the time of the service the original subpœna was shown; and it is a sufficient answer to such a rule that the affidavit does not so allege. *Garden v. Cresswell*, 2 Mee. & W. 319.

And the affidavit must state that the party was a material witness. *Tinley v. Porter*, 2 Mee. & W. 822; 5 Dowl. 744.

If the original subpœna be not shown, the rule will be discharged with costs. *Jacob v. Hungate*, 3 Dowl. 456, Ex.

In a previous case in the Common Pleas it was held that the original subpœna need not be shown. *Taylor v. Williams*, 4 M. & P. 59.

But subsequently that court held, that the original subpœna must be shown at the time of the service of the copy. *Smith v. Truscott*, 1 Dowl. & L. 530, C. P.

*Attachment for keeping a witness out of the way.]* An attachment lies against a party who keeps a witness out of the way and prevents the service of the subpœna. *Clements v. Williams*, 2 Scott, 814.

*Attachment refused against a defendant.]* The court refused an attachment against the defendant for attempting to persuade a witness not to give evidence at the trial, it not appearing that the witness was prevented from being subpoenaed through the defendant's interference. *Schlesinger v. Flersheim*, 2 Dowl. & L. 737.

*Application for a habeas corpus by a party in custody under an attachment.]* The court will not grant a habeas corpus to bring up a

## ATTACHMENT.

party in custody under an attachment, to enable him to move in person to set it aside. *Ford v. Nassau*, 9 Mee. & W. 793.

*Attachment from chancery—tender of the money on arrest.]* Upon an attachment from chancery for non-payment of money, tendering the amount to the officer does not entitle the party to his discharge. *Pitt v. Coombs*, 3 N. & M. 212; 5 B. & Ad. 1078.

*Attachment under a warrant by the speaker of the House of Commons.]* The warrant of the speaker of the House of Commons is to be construed with the same respect as is shown to a writ issuing out of any of the superior courts at Westminster. And inasmuch as it is unnecessary for a writ of attachment issued by any superior court to state any special grounds, in order to show that the court is acting duly, formally, and regularly; so neither is it requisite for the order of the House of Commons or the speaker's warrant to contain any like allegation. *Gosset v. Howard*, Ex. Chamber in error, H. T. 1847.

The House of Commons, as a part of the high court of Parliament, is not merely a superior but the supreme court in this country, and higher than the ordinary courts of common law. *Per Lord Camden in Entick v. Carrington*, 19 State Trials, 1047.

The warrant of the speaker of the House of Commons, in a general form, is equally a protection to the serjeant at arms as a writ of attachment in the general form issued by a superior court is a protection to the sheriff. *Gosset v. Howard*, as above.

*Attachment for not aiding in the execution of a writ of rebellion.]* The persons named in a writ of rebellion, and charged with the execution of it, have a right, at their discretion, to require the assistance of any of the liege subjects of the crown, to assist in the execution of the writ; and a stranger to the proceedings in the cause called upon to assist in the execution of the writ, and declining to do so, is liable to an attachment for contempt. *Miller v. Knox*, 4 Bing. 574.

*An alias writ of attachment may be issued.]* A party in contempt being permitted to be at large, may be re-taken on an alias attachment. *Good v. Wilks*, 6 M. & Sel. 413.

*Report of the master on a reference to him of the ground for an attachment is conclusive.]* The master's report that the defendant has cleared himself from the contempt will not be revised by the court, unless it appears from the interrogatories and answer he is mistaken. *Rex v. Morley*, 4 A. & E. 849.

## ATTORNEY.

*Attorney, privilege of, from arrest while attending a county court.]* An attorney who had been properly admitted in the superior courts, was arrested while attending in his professional capacity in the county court:—Held, that he was entitled to his discharge, upon affidavits showing the above facts, and in the absence of any counter statement that he was not entitled to practise in the county court. *Clutterbuck v. Halls*, 15 Law J., Q. B. 310; 10 Jur. 1082.

And while in attendance at the master's office taxing costs, as well as returning therefrom. *In re Hope*, 9 Jur. 846, B. C.—Wightman, J.

*Privilege of an attorney as to the venue.]* Since the uniformity of process act, an attorney does not waive his privilege of laying the venue in Middlesex, by omitting to describe himself as an attorney in the declaration. *Williams v. Powell*, 10 Jur. 966, B. C. and *Cutts v. Surridge*, 16 Law J., Q. B. 2.

But the privilege only applies where he sues in person, and not when he employs another attorney. *Harrington v. Page*, 2 Dowl. 164.

Where an attorney sues in person, it is no ground for changing the venue in such a case that the witnesses on both sides reside in the county to which the venue is sought to be changed. *Pilcher v. Sh. of Monmouth*, 2 Marsh, 152.

But if an attorney lay the venue in a different county, the court will not afterwards allow him to amend, by changing the venue to Middlesex. *Lewis v. Shelly*, 7 Taunt. 146.

An attorney, when defendant, has no privilege as to venue, and therefore cannot change the venue to Middlesex, unless the cause of action accrued there. *Yeardly v. Roe*, 3 T. R. 573; and *Pope v. Redfearne*, 4 Burr. 2027.

*Privilege of an attorney to be sued in his own court.]* To an action in the Common Pleas against an attorney, a plea that he is an attorney of the court of Queen's Bench, and not of the court of Common Pleas, must be pleaded by attorney and not in person. *Groom v. Wortham*, 12 Law J., C. P. 88.

An attorney is still entitled to be sued in his court, notwithstanding 2 Will. 4, c. 39. *Lewis v. Kerr*, 2 M. & W. 226; 5 Dowl. 327, 447, and *Percival v. Cook*, 7 Dowl. 500.

And the 1 Vic. c. 56, does not deprive an attorney of the privilege of being sued in his own court, but only subjects him to the jurisdiction of another court in which he has acted. *Prior v. Smith*, 6 Dowl. 299.

*Attorney not bound to sue in a court of requests.]* An attorney, plaintiff, is not obliged to sue in a court of requests, for a debt, unless his privilege in that respect be taken away by express words in the statute creating or regulating the court. *Johnson v. Bray*, 2 Brod. & B. 698; and *Board v. Parker*, 7 East, 46.

Nor can an attorney as defendant be sued in a court of requests, unless his privilege in that respect be taken away by express words in the statute creating or regulating the court. *Gardner v. Jessop*, 2 Wils. 42; *Wiltshire v. Lloyd*, 1 Doug. 381.

*Attorney, admission of, to the Lord Mayor's court under 6 & 7 Vic. c. 73, s. 27.]* The Lord Mayor's court is an inferior court, within the meaning of the 6 & 7 Vic. c. 73, s. 27, notwithstanding its peculiar customs and jurisdiction. Every attorney duly qualified is entitled to be admitted an attorney therein, although there is not, and never has been a roll of the attorneys of that court. *The Queen v. The Lord Mayor, &c. of London*, 16 Law J., Q. B. 185.

*Privilege of attorney.]* Since the uniformity of process act, 2 Will.

4, c. 39, an attorney can no longer sue by attachment of privilege; and therefore, though he sues in his own court as a common person, the court will not enter a suggestion on the roll to deprive him of costs for not suing in the Middlesex Court of Requests. *Wright v. Skinner*, 1 Mee. & W. 144.

An attorney who is going abroad is not privileged from arrest on mesne process, under the 1 & 2 Vic. c. 110, s. 3. *Flight v. Cook*, 1 Dowl. & L. 714, Q. B.; 13 Law J., Q. B. 78.

The rule that an attorney, sued jointly with an unprivileged person, shall lose his privilege of being sued in his own court is not altered by the uniformity of process act. *Rastrick v. Beckwith*, 2 Dowl. & L. 624; 8 Scott N. R. 716; 14 Law J., C. P. 1.

A defendant who is an attorney in two of the superior courts may be sued in either, at the option of the plaintiff. *Walford v. Fleetwood*, 14 Mee. & W. 449; 14 Law J., Ex. 271.

*Jurisdiction of the court over an attorney.]* Where an attorney has been guilty of misconduct in the course of a cause, the court will grant a rule calling on him to show cause why his name should not be struck off the roll, even although the matter complained of may amount to an indictable offence; but the court will not, under such circumstances, call upon him to answer the matters of an affidavit. The affidavits to ground an application to strike an attorney off the roll, for misconduct in a cause, may be entitled in the cause, though judgment has been obtained in it. *Stephens v. Hill*, 10 Mee. & W. 28.

A motion to compel an attorney to answer the matters of an affidavit cannot be made on the last day of term. *Re Turner*, 3 Dowl. 557.

An application for a rule requiring an attorney to answer the matters of an affidavit must be made by a gentleman at the bar. *Ex parte Pitt*, 2 Dowl. 439; 5 B. & Ad. 107.

An attachment against an attorney for misconduct cannot be moved for by a complainant in person, but the motion must be made by a gentleman at the bar. *Ex parte Fenn*, 2 Dowl. 527.

*Attorney—summary jurisdiction of court over.]* The court will not entertain a motion touching the conduct of an attorney, unless it appears upon affidavit that he is an attorney of the court, or that the transaction arises, in part at least, out of a cause before the court; nor will the court exercise its summary jurisdiction over an officer, unless in a case of palpable fraud. *In re Lord*, 2 Scott, 131.

Where a party, about to borrow money to carry on a law-suit in an ecclesiastical or in an Irish court, referred the lender to an attorney to inform him of the nature of the suit, and the latter gave a guarantee of the loan, but one on which an action would not lie:—Held, that the court would not interfere summarily to enforce the guarantee. *In re Kearns*, 11 Jur. 521.

Where an attorney was intrusted by executors with a sum of money, for the purpose of paying legacy duty, and failed so to apply it, the court refused to interfere summarily to compel him to refund the money, as it did not appear that this employment was necessary in his professional character, or that he had on other occasions ever acted as attorney for the parties. *In re Webb*, 14 Law J., Q. B. 244.

*Town agent for some purpose is the same as attorney in the cause.]* A town agent, conducting the cause in the court above, is an "attorney" within the meaning of the Reg. Gen. 27th May, 1840, upon whom the demand may be made for the payment of costs under a judge's order. *Thompson v. Billing*, 11 Mee. & W. 361.

*Attorney undertaking to enter appearance.]* Where a plaintiff moved for an attachment against an attorney for not entering an appearance, pursuant to his undertaking; and it appeared that he had not, previous to moving the rule, requested the attorney to enter the appearance, the court discharged the rule. *Jacob v. Magney*, 12 Law J., Q. B. 93.

*Attorney agreeing that his costs shall depend on the suit succeeding.]* An attorney who undertakes to conduct a suit upon the terms that he is not to be paid unless it succeeds, is not entitled upon failure of the suit to recover money paid out of pocket. *Turner v. Tennant*, 10 Jur. 429, Q. B. note.

*Attorney undertaking to charge costs out of pocket only.]* An attorney, on being retained to bring an action, gave the following undertaking: "Should the damages or costs not be recoverable in this action, under the circumstances, I shall charge you costs out of purse only." The plaintiff obtained a verdict, with 600*l.* damages, for which sum and costs judgment was entered up. The defendant took the benefit of the Insolvent Act, and the dividend on his estate awarded to the plaintiff was 272*l.* odd. The master, on taxation, allowed the attorney costs out of pocket only, but referred the matter to a judge, who directed the taxation of costs out of pocket only. A second summons was taken out before the same judge, to review the taxation, and dismissed:—Held, first, that the party was not precluded from appealing to the court; and secondly, that the taxation was incorrect. *In re Stretton*, 3 Dowl. and L. 278; 15 Law J., Ex. 16; 14 Mee. & W. 806.

*Undertaking by an attorney to pay the debt of the defendant.]* Where the attorney of the defendant had given an undertaking to pay the debt, in consequence of which the plaintiff stayed proceedings, the court enforced the undertaking, although it was void under the 4th section of the Statute of Frauds. *In re Hilliard*, 2 Dowl. & L. 919, Q. B.

*Undertaking by attorney to pay money—lapse of time.]* It is no answer to a rule, calling upon an attorney to pay money pursuant to his undertaking, that more than two years have elapsed since the undertaking was given. *In re Robt. Swan*, 15 Law J., Q. B. 402.

*Attorney undertaking that defendant shall pay.]* Where an attorney, for the purpose of settling an action, in which he had been professionally employed, prepared a promissory note to be signed by the defendant, and also himself signed an undertaking to pay the amount due on the note in case of default being made by the defendant, the court, on a summary application, compelled him to perform the under-

taking. *In re Fairthorne, gent.*, 15 Law J., Q. B. 130; 3 Dowl. & L. 548.

*An attorney has no right to prevent a compromise between the parties.]* The attorney of a defendant has no such interest in the suit as to prevent the parties from compromising it without his consent. *Quested v. Callis*, 10 Mee. & W. 18.

An attorney is not justified in proceeding with an action after it has been settled between the parties themselves, though it is known that costs have been incurred, and that the plaintiff himself is not in a condition to pay them : it must be shown affirmatively that the settlement was come to for the purpose of cheating the attorney. *Jordan v. Hunt*, 3 Dowl. 666.

*Attorney bringing an action without authority.]* Where an attorney brings an action in the name of a person without his authority, the court will stay the proceedings, on the motion of the defendant, and make the attorney pay the costs. *Hubbart v. Phillips*, 13 Mee. & W. 703 ; 2 Dowl. & L. 707 ; 14 Law J., Ex. 103.

*An attorney ordered to refund money—effect of disobedience.]* Where an attorney, who has been directed by the master of the court to refund a sum of money, disobeys the direction, and keeps out of the way, the court will order him to be struck off the roll. *In re —*, 10 Jur. 198, Q. B.

*Attorney when privileged from disclosing his client's deed.]* A party who is protected from producing a deed at Nisi Prius, on the ground that he holds it as a trustee for one of the parties, is not compellable to disclose the contents of it.

An attorney for a party in a cause is not bound to state the contents of a deed, of which he first obtained a knowledge by having obtained and read it, at the suggestion of his counsel, at the consultation in the cause. *Davies v. Waters*, 9 Mee. & W. 608 ; 1 Dowl. N. S. 651 ; 11 Law J., Ex. 214.

*Striking attorney off the roll.]* The court will not grant a rule in the alternative, calling on an attorney to show cause why he should not be struck off the roll, or answer the matters in the affidavit, as either branch of the rule should be the subject of a distinct application. *Burton v. Chesterfield (Earl)*, 9 Jur. 373, B. C.—Williams, J.; Anon. ib. B. C.—Coleridge, J.

*Attorney relinquishing a suit.]* An attorney's undertaking to carry on a suit is an entire contract to carry it on to its termination, and can be determined by the attorney only upon reasonable notice. *Harris and another v. Osbourn*, 2 Cr. & M. 629.

An attorney who has undertaken a cause is not bound to proceed in it without adequate advances from time to time by his client, for expenses out of pocket ; and therefore the court will not compel an attorney, even after notice of trial, to carry the cause into court, unless the client supply him with the necessary funds for that purpose. *Wadsworth v. Marshall*, 2 Cromp. & J. 665.

An attorney, who has commenced an action for his client, has a right to refuse to go on without an advance of money on account, provided he gives his client sufficient notice of his intention, to enable him to make the required provision. *Lawrence v. Potts*, 6 C. & P. 428.

To entitle an attorney to costs, he is not compelled to proceed to the end of a suit, but may, upon reasonable cause and reasonable notice, abandon the further conduct of the suit, and recover his costs for the time during which he was employed. *Van Sandau v. Browne*, 2 Mo. & Sc. 543; 9 Bing. 402; 2 Law J., C. P. 34.

An attorney may refuse to proceed with a cause, unless he be supplied with funds; but he must give reasonable notice to that effect. Therefore where, on the commission day of the assizes, he said that he should not deliver briefs till the plaintiff gave him money to fee counsel,—that was held not to be sufficiently reasonable notice to entitle him to abandon the case, because he had received no money; although the plaintiff promised to return and bring the money, but did not, before the cause was called on. *Hoby v. Built*, 3 B. & Ad. 350; 1 Law J., K. B. 121.

*Attorney, the acts of, how far binding on the client.]* All acts done by an attorney within the scope of his authority his client is bound by. He is bound even by the acts of the attorney's agent. *Griffiths v. Williams*, 1 T. R. 710.

Payment of the debt to an agent employed to sue the defendant by the plaintiff's attorney, is not payment to the plaintiff, though payment to the attorney himself is. *Yates v. Freckleton*, 2 Doug. 622.

The authority of an attorney to conduct a suit does not extend to giving a discharge to a prisoner, in execution on judgment in the suit, without receiving the amount of the debt. *Savory, assignee, &c. v. Chapman*, 9 Law J., Q. B. 186.

It appears by several cases collected in 1 Rolle's Abridgment, fol. 291, that the authority of an attorney determines with the judgment. *Tipping v. Johnson*, 2 Bos. & Pul. 357.

Where a cause is referred at Nisi Prius, with the consent of the counsel and attorney, the court will not set it aside on an affidavit by a party expressly denying his attorney's authority to refer. *Filmer v. Delber*, 3 Taunt. 484.

An attorney who consents to a rule without his client's sanction, binds his client. *Thomas v. Hewes*, 2 C. & M. 519; 5 Tyrw. 335.

Where the attorneys for the plaintiff and defendant, in a cause which was ready for trial, entered into an agreement whereby they personally undertook that the record should be withdrawn, that certain things should be done by the plaintiff and defendant, and that the costs should be taxed for the defendant in a certain manner:—Held, that the attorney for the plaintiff was personally bound to pay the costs when taxed in the mode specified. *Iveson, gent. &c. v. Conington, gent. &c.* 1 B. & C. 160.

*Attorney, authority of, the client residing abroad.]* Where an attorney applied to set aside a warrant of attorney, executed by a party who was abroad, on the ground of an insufficient attestation, and his affidavit showed that he had only a general authority to manage the

affairs of such party during his absence; the court would not infer an authority in the particular transaction, and discharged the rule with costs. *Lewis v. The Earl of Tankerville*, 12 Law J., Ex. 234.

*Agent of attorney has no lien on money or papers of the client beyond the suit.]* An agent has no general lien on the money or papers of the client in his hands, for any balance due to him by the country attorney; he can claim merely to the extent of his agency costs in the client's suit. *White v. Royal Exchange Assurance*, 1 Bing. 21. But an agent has the ordinary lien of an attorney, for his general balance, upon the papers or money of his own client, the country attorney, which may come into his hands. *Taunton v. Goforth*, 6 D. & R. 384.

*Attorney's bill of costs, recovery of, after he has discontinued an action.]* An attorney is not entitled to recover his bill of costs for conducting an action which he has not terminated, but which has been discontinued, unless he shows satisfactory reasons for not proceeding with it, and gives his client reasonable notice thereof. *Nicholls v. Wilson*, 11 Mee. & W. 106.

*Attorney's bill of costs should name the court and cause.]* An attorney's bill, delivered under the stat. 2 Geo. 2, c. 23, s. 23, should either expressly mention the name of the court and cause in which the business to which it relates was transacted, or same must appear by reasonable intendment, from the charges of which the bill consists. *Martindale v. Falkner and others*, 10 Jur. 161, C. P.; 15 Law J., C. P. 91; 3 Dowl. & L. 600.

Under the above statute an attorney's bill for work and disbursements in a suit must specify the court in which the suit was. *Lewis v. Primrose*, 6 Q. B. 265.

*Attorney's bill of costs—title of court.]* An attorney's bill delivered under 6 & 7 Vic. c. 73, s. 37, must give substantial information as to what court the business was transacted in. *Englehart v. Moore*, 15 Law J., Ex. 312.

An application to compel an attorney to deliver his bill, must be made to the court in which some of the business is done, and the affidavit entitled in that court. *In re Lord Cardross*, 5 Mee. & W. 545; 8 Dowl. 861.

*Delivery of an attorney's bill of costs.]* A bill of costs, in which no name of a client as chargeable was introduced, was forwarded by post inclosed in a letter signed by the attorney and charging the defendant, and requesting a cheque for the amount:—Held, that the letter and bill must be taken in connection and read together; and that this was a sufficient delivery of an attorney's bill, within the 6 & 7 Vic. c. 73, s. 37. *Taylor v. Hodgson*, 10 Jur. 355, Q. B.; 3 Dowl. & L. 115.

The lord chancellor held, (affirming the decision of the master of the rolls), that, under sect. 37 of the above act, a bill of costs, which has been delivered, may be referred for taxation, though not signed by the solicitor, nor enclosed in a letter signed by him, and referring to such bill. *In re Pender*, 10 Jur. 891.

An attorney or solicitor's bill of costs delivered to his client under the 6 & 7 Vic. c. 73, s. 37, must state the name of the court in which the business was done; and therefore:—where an attorney about to sue his client delivered a bill of costs within the time required by that statute, in which part of the business was described as having been done in the Court of Chancery, and the name of the court in which the rest had been done was not mentioned:—Held, that the plaintiff could not recover even for the portion done in chancery. *Icimey v. Marks*, 1 Jur. 355.

*Taxation of a solicitor's bill for business in chancery.]* A judge of a court of common law has no authority to order that a solicitor's bill for business done in chancery be referred to taxation, although an action at law has been brought to recover the amount of the bill. *Bush v. Sayer*, 14 Law J., C. P. 35; 2 Dowl. & L. 602; 8 Scott N. R. 56.

Semblé, that the court has jurisdiction to tax an attorney's bill for business done on the crown side of the Queen's Bench. *In re Barker*, 9 Jur. 976, Ex.

*Changing attorney.]* There must be a rule to change the attorney where an attorney has acted for a party, though his name be not on the record. *May v. Pike*, 4 M. & W. 197; 6 Dowl. 667; and *Macpherson v. Robinson*, 1 Doug. 217.

The want of an order for changing an attorney is waived by the opposite party treating the new attorney as one duly appointed. *Farley v. Hebbes*, 3 Dowl. 538.

And if a defendant who is an attorney really appears in person, but in point of form as attorney, a plea in the name of another attorney cannot be treated as a nullity, on the ground of no order for change of attorney having been served. *Kerrison v. Wallingborough*, 5 Dowl. 564, B. C.

The death of an attorney pending an action does not revoke his agent's authority, therefore he may proceed in the action. *Taunton v. Goforth*, 6 Dowl. 384, K. B.

*An attorney in a suit is liable to a sheriff's officer for caption fees, &c.]* A sheriff's officer may maintain an action against the attorney of the plaintiff in the original suit, for caption fees and conduct money, on proof of an employment by the attorney and that it is the usual course of business for the attorney to be charged with, and to pay such fees. Proof of the usage of business is admissible in evidence to establish the liability of the attorney. *Newton v. Chambers*, 1 Dowl. & L. 869, Q. B.

But in a subsequent case it has been held, that the attorney of the execution plaintiff is not liable to the sheriff for the fees due on the execution of a writ of ca. sa. *Maybery v. Mansfield*, 16 Law J., Q. B. 102.

*Signature to attorney's bill.]* A bill for work done by two attorneys in partnership was delivered, signed by one of them, in the following terms: "This is our bill. For self and Robert Owen,

*J. H. Dixon :*"—Held, that this was a sufficient signature within the stat. 2 Geo. 2, c. 23, s. 23. *Owen v. Scales*, 10 Mee. & W. 657.

*Attorney as attesting witness to warrant of attorney, refusing to prove same.]* Where an attesting witness to a warrant of attorney refused to make an affidavit of the execution, to support a motion for judgment upon it, and it appeared he was colluding with the defendant, the court made a rule absolute, with costs to compel him to do so. *Ex parte Morrison*, 8 Dowl. 94, B. C.; and *Doe d. Avery v. Roe*, 6 Dowl. 518.

*An attorney is bound to give a correct address of his client.]* An attorney who gives a false residence of his client, without using proper means to ascertain whether it is correct or not, subjects himself to the costs which may be occasioned by moving for an attachment against him; but he is not liable to pay the costs of the action, if he is bona fide unable, after proper inquiry, to give his client's residence. *Neal v. Holden*, 3 Dowl. 493, Ex.

*Computation of time in the delivery of an attorney's bill.]* The words, one month, in the 2 Geo. 2, c. 23, before action brought on an attorney's bill, mean twenty-eight days, both exclusive of the day of delivery and of commencing the action. *Blunt v. Heslop*, 8 Ad. & E. 577; 3 N. & P. 533.

*Power of umpire to enlarge time for making his award.]* By agreement of reference, a cause and all matters in dispute were referred to two arbitrators, provided they made their award on a certain day; and power was given them to enlarge the time for making their award. In case of their non-agreement, they were to choose an umpire, who should have power to make the award "at the time and in manner aforesaid:"—Held, that these words gave the umpire power to enlarge the time by his single authority, in the same manner as the arbitrators might have done. *In re Vinicombe and Morgan*, 10 Law J., Q. B. 128.

*Enlargement of time for making award.]* Where parties proceed with a knowledge that the time has not been duly enlarged, the objection is waived. *Lawrence v. Hodgson*, 1 Y. & J. 16.

An irregular enlargement of time is waived by a subsequent regular extension by consent. *Bonwell v. Hinckman*, 1 C. M. & R. 935; 3 Dowl. 500; 5 Tyrw. 509.

Or by a subsequent attendance before the arbitrator. *Hallett v. Hallett*, 5 Mee. & W. 25; 7 Dowl. 389.

Where the time originally fixed for making an award had been allowed to pass, through the neglect of the plaintiff's attorney before the order of reference was obtained from the associate, the court refused to interfere to compel the defendant to enter into a new submission; but left the plaintiff to go on with the cause. *Doe d. Fisher v. Saunders*, 3 B. & Ad. 783; 1 Law J., K. B. 273.

A cause was referred by order of Nisi Prius to the decision of an arbitrator, so as to make his award before the fourth day of Easter term, with power to enlarge the time, but the order did not direct in what mode the time was to be enlarged. Two days before the time had expired, the arbitrator, in the presence of both parties, appointed another meeting on the 29th June, on which day one of the parties not having attended, the arbitrator made his award:—Held, that the appointment of a further day for the reference, neither party making any objection to it, amounted to a due enlargement of the time. The power given to the court, or a judge, by 3 & 4 Will. 4, c. 42, s. 39, to enlarge the time for an arbitrator to make his award, is general, and is not confined to cases where there has been a revocation of the submission. *Burley v. Stephens*, 1 Mee. & W. 156.

An arbitrator who had power to enlarge the time for making his award, by indorsement on the order of reference, made the following indorsement:—“I direct that a rule of this court shall be applied for by counsel’s hand, to enlarge the time for making my award.” No such rule was applied for: but the parties subsequently attended meetings before the arbitrator, and made no objection to the regularity of the enlargement:—Held, first, that the indorsement was itself a sufficient enlargement at the time: secondly, that if it were not, the irregularity had been waived. *Hallett v. Hallett*, 5 Mee. & W. 25.

*Power of the court to enlarge the time for making an award.]* The power of the court or a judge, under 3 & 4 Will. 4, c. 42, s. 39, to enlarge the time of making an award, is not confined to the case where a party to the reference has revoked his submission. Two causes were referred to an arbitrator, who was to make his award on a certain day, or on such further day as he should appoint. The arbitrator having allowed the time to expire without making any award:—Held, that the court were authorised under this act to enlarge the time for making the award. *Parbery v. Newnham*, and *Newnham v. Parbery*, 7 Mee. & W. 378; 10 Law J., Ex. 169.

*Computation of time for making award.]* On a reference to arbitration it was agreed that the award should be made by the umpire within two calendar months next after the matters were referred to him. The umpire was appointed on the 29th June, and the time for making the award was enlarged for three months:—Held, that, in computing this time, the 29th June was to be excluded; and that, consequently, an award made on the 29th of September was within the time limited. *Ex parte Higham and Jessop*, 1 Woll. 28, B. C.

The word “months” in a submission means lunar months. *In re Swinford*, 6 M. & Selw. 226.

*Award—costs of the cause to abide the event of the award, or costs of the reference and award to abide the event.]* Where, in an order of reference, the costs of the cause are to abide the event of the award, the arbitrator is bound to find specifically upon each issue. But where the costs of the reference and award only are to abide the event, he is not bound so to find, unless required by the terms of the rule of reference. *Bourke v. Lloyd*, 12 Law J., Ex. 4.

*Award on several issues.]* To a declaration containing three counts, the defendant pleaded non assumpsit, tender, set-off, and payment, upon which issues were joined. The cause being referred at Nisi Prius, the costs of the cause to abide the event of the award, the arbitrator found for the plaintiff on the first, third, and fourth issues; and on the second for the defendant:—Held, that the finding was sufficient, and that it was not necessary there should be distinct findings on the issues raised by the plea of non assumpsit upon each separate count of the declaration. *Adams v. Rowe*, 10 Jur. 840, Q. B.

An arbitrator is not bound to do more than find on the whole for one party, and where the arbitrator had neglected to point out on what count the money was found to be due or whether upon all, the court refused to disturb the award. *Clements v. Fuller*, 11 Jur. 242, Q. B.

In an action, in which two issues were raised, each of which went to the whole cause of action, all matters in difference were referred; the costs of the cause to abide the event. The arbitrators awarded generally that the action should be no further prosecuted, and that a sum should be paid by the defendant to the plaintiff:—Held, that the award sufficiently ascertained the event, and was final. *Hobson v. Stewart*, 16 Law J., Q. B. 145.

Where to one count in a declaration, there were five pleas, each of which, if true, was a complete answer to the count, and the cause was referred to arbitration, the costs of the action and of the award to abide the event of the award, and the arbitrator found that the plaintiff had a good cause of action on that count, a rule was made absolute, ordering the master to tax the plaintiff his costs on all the issues arising on that count.

Quaere,—whether such a finding does not, in fact, amount to a distinct finding upon each of the issues. *Williamson v. Lock*, 14 Law J., Q. B. 93.

Issue having been joined in an action for goods sold, with the common money counts, to which the defendant pleaded non assumpsit, payment, and a set-off, it was agreed that all proceedings in the action should be stayed, and that all matters in difference should be referred to two arbitrators, who were to award concerning the same, the costs of the action to abide the event of the award. The arbitrators awarded that the defendant was indebted to the plaintiff in the sum of 68*l.* 11*s.* 5*d.*, and that final judgment should be entered up for the plaintiff for that sum, besides his costs of suit, to be taxed, and that that sum with costs should be paid by the defendant to the plaintiff:—Held, that there being no finding on all the issues, the award was bad. *Kilburn v. Kilburn*, 14 Law J., Ex. 160.

On a reference of all matters in difference, a party put forward a claim for a debt, and also for contingent damages, and the other party claimed and gave evidence of a set-off. The arbitrators awarded generally, that a sum of 515*l.* was due from the latter to the former:—Held, that the award was good, though it did not specify how much had been allowed for the debt, and how much for the damages, or whether the set-off had been allowed or not. *Brown v. Croydon Canal Company*, 9 Ad. & E. 522; 8 Law J., Q. B. 92; 1 P. & D. 391.

Where several issues are referred to an arbitrator, it is not indispens-

sably necessary for him to award on each issue, if his intention, as to each of them, is sufficiently clear from the general language of the award. *Hunt v. Hunt*, 5 Dowl. 442.

Upon a reference of an action on a promissory note, and on an account stated, to which the pleas were, as to the first count, fraud and covin, and as to the second, non assumpsit, the arbitrator found that the plaintiff "had good cause of action for, and was and is legally entitled to have, claim, and recover the sum of, &c., being the amount of the promissory note mentioned in the pleadings:"—Held, that the award was bad, as not disposing of both the issues. *Gisborne v. Hart*, 5 Mee. & W. 50; 8 Law J., Ex. 197; 7 Dowl. 402.

If, upon a reference of a cause to arbitration, the costs to abide the event, there is a finding for the defendant upon a plea which covers the whole cause of action, it is no objection to the award that on other issues the arbitrator has found for the plaintiff, without damages. *Savage v. Ashwin*, 4 Mee. & W. 530; 8 Law J., Ex. 43.

In an action of debt containing several common counts, the defendant pleaded the general issue and several special pleas. An arbitrator, to whom the cause was referred, awarded, that there was justly due and owing to the plaintiff from the defendant the sum of 60*l.* 9*s.* 7*d.* :—Held, that the award was bad, for not disposing of the issues. *Morgan v. Thomas*, 9 Jur., Ex. 92.

The court, on deciding this case, intimated that in future orders of reference ought to contain a clause as follows:—"That the said arbitrator shall find generally for the plaintiff or for the defendant and not find upon any specific issues unless required so to do." And this clause is now inserted in the orders of reference in the Exchequer.

*Award in several causes referred.]* Where several actions are referred, "the costs of the several actions, and of all matters and things relating thereto, to abide the event of the award," and the arbitrator directs the costs of each action to be paid to the successful party in each suit, the award is good, although the same party has not succeeded in all the actions.

After the award is made, it is too late for the unsuccessful party to object that certain infants have been parties to the submission, and that certain other interested persons have not been parties to it. *Jones v. Powell*, 6 Dowl. 483.

*Copy of an award verified by affidavit.]* An affidavit verifying a copy of an award to be a true copy need not state that the copy has been compared with the original award. *Hawkyard and another v. Stokes and others*, 2 Dowl. & L. 936, Q. B.

*Award—examination of witnesses on oath—variance in sum awarded and the order.]* Where an arbitrator omitted to state in his award that the evidence he had heard was upon oath, and likewise to whom the costs of the award were to be paid by the unsuccessful party:—Held, that the award was good. Where the arbitrator awarded a larger sum than that mentioned in the order of reference, and there appeared to be a mistake in that order as to the sum:—Semble, that the court would amend that order. *Haunan v. Jube*, 10 Jur. 926, Q. B.

*Award where the arbitrator has had a view.]* Where, by agreement of reference, the arbitrator is to take a view previous to entering on the reference, and he takes such view, an omission to recite the fact is no objection to his award. *Spence v. Eastern Counties Railway*, 7 Dowl. 697.

*Time for moving to enter a verdict pursuant to an award.]* By order of Nisi Pruis a verdict was taken for the plaintiff, subject to the award of an arbitrator, to whom all matters in difference in the cause were referred, and who was to state, on the face of his award, such points of law as either of the parties might require. The arbitrator, on the 13th of November, made his award, and directed that, unless the court should otherwise order, the verdict for the plaintiff should stand on all the issues, but that the damages should be reduced; and proceeded to direct, that in certain events, and with reference to certain points of law stated in his award, the verdict should be entered for the plaintiff on the first, and for the defendants on the second and third issues. The parties had notice of the award on the 16th November:—Held, that the defendants could not in Hilary term move to enter a verdict on the points stated by the arbitrator, but should have moved within four days after notice of the award. *Paxton v. Gt. North of England Railway*, 15 Law J., Q. B. 270; 10 Jur. 430.

*The sum awarded on reference should not exceed the amount of the particulars of demand.]* A verdict was entered, by consent, for a sum greater than that claimed by the particulars of demand, and the amount of damages in the cause was referred to arbitration. The arbitrator having awarded to the plaintiff the amount of the verdict, on motion to set aside the award:—Semble, that the particulars of demand were not necessarily before the arbitrator; and therefore that the defendant, if he meant to limit the plaintiff's demand, ought to have brought the particulars before the arbitrator. *Kenrick v. Phillips*, 7 Mee. & W. 415; 10 Law J., Ex. 226.

*An award directing proceedings in two causes to cease, and a sum of money to be paid by defendant good.]* Two causes, (brought by the same plaintiff against the same defendant; in one of which a declaration had been delivered, and in the other a writ only had issued,) were referred to arbitration, the cost of the causes, reference, and award to abide the event. The arbitrator, after stating that he made his award concerning the premises, adjudged and determined that all further proceedings should cease, and that the defendant should pay to the plaintiff a certain sum in full of all demands in the said causes:—Held, that the award was good. *Wynne v. Edwards*, 1 Dowl. & L. 976, Ex.

*Proceedings for execution under an award.]* The court in general requires the same formalities to be observed as to personal service, where the application is with a view to issue execution under an award, by virtue of 1 & 2 Vic. c. 110, s. 18, as in cases of attachment. *Hawkins v. Benton and another*, 2 Dowl. & L. 465, Q. B.

*Award directing money to be paid on a certain day.]* An award,

dated "13th October, 1840," directed a sum of money to be paid "28th October next":—Held, that it meant the 28th of that month. *Brown v. Smith*, 8 Dowl. 835, Ex.

*Award must be explicit.]* An award will not be enforced on motion, if there be an ambiguity on the face of it as to the identity of a material deed, and as to the precise amount of costs to be paid. *Spooner v. Payne*, 11 Jur. B. C. 242.

*Award directing a nonsuit to be entered.]* A cause, and all matters in difference between the parties, were referred by order of Nisi Prius to the award, arbitrament, final end and determination of A. B.; and the order provided that the verdict should be entered for the plaintiff for the damages in the declaration, subject to be reduced or vacated, or, instead thereof, a verdict for the defendant, or a nonsuit entered according to his award. There were no matters in difference except in the cause. The arbitrator awarded that the verdict should be vacated, and a nonsuit entered:—Held, bad, as not finally determining the matters in difference in the cause.—Parke, B. dissentiente. *Wild and others v. Holt and another*, 11 Law J., Ex. 263.

*Award bad, directing costs between attorney and client.]* A cause, and all matters in difference, were referred to two arbitrators, the costs of the action, reference and award, and the costs incident thereto, to be in the discretion of the arbitrators. They awarded, that the defendant should pay the plaintiff 50*l.* towards the costs of the cause and reference, and that the plaintiff should pay his own and the defendant's costs in the cause and reference, to be taxed as between attorney and client:—Held, that the award was bad, inasmuch as the order to tax costs as between attorney and client was an excess of authority, and so connected with the rest of the award that it could not be rejected as surplusage. *Seccombe v. Babb*, 6 Mee. & W. 129; 9 Law J., Ex. 65; 8 Dowl. 167.

*Award directing a verdict to be entered under an order of reference.]* Where a cause was referred by judge's order before trial, which gave no express power to direct a verdict to be entered, and the arbitrator awarded that a verdict should be entered for the plaintiff, with damages and costs, the court refused a rule to show cause why the award should not be set aside.

A rule afterwards obtained to enforce the award by attachment was discharged, with costs. *Cock v. Gent and others*, 15 Law J., Ex. 33; 13 Mee. & W. 364; and 14 Mee. & W. 680.

*An award finding a plea to the whole action for defendant need not assess damages on the issues for plaintiff.]* Where an arbitrator finds for the defendant upon issues raised on pleas which cover the whole cause of action, he need not in his award assess damages on such issues as he finds for the plaintiff. *Warwick and another v. Cox*, 1 Dowl. & L. 986, Ex.

*Award by two of three arbitrators.]* A cause, and all matters in difference, were referred to the arbitration of three persons, the award

of the three, or of any two of them, to be final. The award purported on the face of it to be made by all three, but was executed by two only, the third having refused to sign it when requested to do so:—Held, that the award was good as the award of the two, and supported an issue in which it was so stated. *White v. Sharp*, 12 Mee. & W. 712.

*Award on a reference before plea.]* Where the reference of an action is made before plea:—Held that the arbitrator is not bound to find specifically on each count. *Bearup v. Peacock*, 2 Dowl. & L. 850; 14 Mee. & W. 149; 14 Law J., Ex. 232.

*Execution of award.]* An award ought to be signed by all the arbitrators, in the presence of each other. *Stalworth v. Inns*, 13 Mee. & W. 466; 2 Dowl. & L. 428; 14 Law J., Ex. 81.

The court, however, refused to set aside an award on motion, because it was signed by the several arbitrators at different times and places, but intimated that they should not enforce it by attachment or rule. *Ib.*

*Award directing verdict to be entered not authorised by the order of reference, bad.]* After issue joined, a cause, and all matters in difference, were referred, by a judge's order, to arbitration, but without power to the arbitrator to direct a verdict to be entered; the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator, by his award, directed that a verdict should be entered for the defendants on all the issues, that each party should pay his own costs of the reference and a moiety of the costs of the award. He further awarded, that the parties should execute mutual general releases of all and all manner of actions, &c. to each other:—Held, that the arbitrator having exceeded his authority in directing a verdict to be entered, that part of the award could not be rejected as surplusage, as, with respect to costs, it was an event inconsistent with the award of releases; and if the release did not extend to the action referred, there was, in effect, no final determination of the action. *Hawkyard and another v. Greenwood and others*, 10 Jur. 14, B. C., Coleridge; 2 Dowl. & L. 936, Q. B.

*Award—arbitrator exceeding his jurisdiction.]* If an arbitrator commit an excess of his authority, and decide upon what is not submitted to his determination, the award is good for so much as is within his jurisdiction; a nullity for that which is without it. *In re Doddington*, 8 Law J., C. P. 331; 5 Bing. N. C. 591; 7 Scott, 733; and *Doddington v. Bailword*, 7 Dowl. 740.

It is an excess of authority in an arbitrator to award a *stet processus* where, by the submission, the costs are to abide the legal event. *Hunt v. Hunt*, 5 Dowl. 442.

It is also an excess of jurisdiction, in such a case, for the arbitrator to determine the amount of the costs. If, however, an arbitrator directs mutual releases on payment of a sum of money over which he has jurisdiction, as well as of a sum over which he has none, the award is good as to the former. *Kendrick v. Davies*, 5 Dowl. 693.

*Award, amendment of, by the arbitrator.]* By an order of reference

the court had power, on the validity of an award being disputed, to remit the matters referred to the reconsideration of the arbitrator. An award having been made, and containing a defect, the attorneys agreed verbally that the arbitrator should amend it; subsequently to which the defendants' attorney obtained a judge's order that the matters referred should be remitted to the arbitrator for his reconsideration. The arbitrator altered the award without giving notice to either party of his intention to do so, neither party having requested him to hear fresh evidence, and he did not recite the judge's order:—Held, that the arbitrator was not bound to give notice to the parties, or to recite the judge's order. *Baker v. Hunter*, 16 Law J., Ex. 203.

*Award not final, referred back to the arbitrator.]* Where the court referred back the matters in difference to the arbitrator, on the ground of the award not being final:—Held, that he was bound to hear evidence relating thereto, although come to the party's knowledge subsequent to the making of the original award: a reference giving the court power to remit the matters back to the arbitrator should be made in the terms, “or any of them,” so that the court may limit the remittal, and modify the inquiry. Sed quære, if the court has power to remit the case a second time. *Nickalls v. Warren*, 2 Dowl. & L. 549.

*Rule to pay money awarded—service of award.]* The court will not grant a rule calling upon a party to pay money found by an award to be due from him, without an affidavit of the service of the award. *Pearson v. Archbold*, 11 Mee. & W. 108.

*Award bad for uncertainty.]* A. commenced a special action on the case against B. and delivered his declaration, which consisted of two counts. Before plea pleaded, all matters in difference between the parties to the cause were referred, by a judge's order, to the award of an arbitrator, the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. The award, which did not purport to have been made “of and concerning the premises,” merely directed that B. should pay to A. the sum of 167*l.* 6*s.* 2*d.* without saying upon what account:—Held, that this award was bad for uncertainty, as it did not show in respect of what matters in difference the money was to be paid, and did not contain any finding upon which the master could tax the costs. *Crosbie v. Holmes*, 10 Jur. 139, B. C., Williams, J.; 15 Law J., Q. B. 125.

*To refer back an award.]* The application to send back the award should be before the first four days of the term. *Lyng v. Sutton*, 3 Scott, 187; 5 Dowl. 39.

*Award referred back for error in plaintiff's Christian name.]* Where the plaintiff was described in the award by a wrong Christian name, and the order of reference provided for referring back the award for amendment, the court referred it to him to correct the mistake. *Howett v. Clements*, 8 Scott, N. S. 851.

*Service of rule to pay money under an award, defendant abroad.]* Where it appeared, upon the face of the affidavit, that the defendant

was abroad, the court refused to grant a rule, (under 1 & 2 Vic. c. 110, s. 18,) calling upon him to show cause why he should not pay a certain sum of money, due on an award; the proposed service of the rule being by leaving a copy at his last known place of abode in England, and by sticking up another copy in the master's office. *Wilson v. Foster*, 1 Dowl. & L. 496, C. P.

*Award omitting to decide on certain matters in difference.]* The court will not grant a rule nisi for setting aside an award, on the ground that it omits to decide on certain matters in difference, unless it plainly appears from the affidavit that those matters were distinctly brought under the arbitrator's attention, and that he was expressly required to adjudicate upon them. *Layman v. Gowan*, 10 Law J., C. P. 95.

*An arbitrator may award costs to be paid by an infant plaintiff.]* An action on an apprentice deed was referred to arbitration by order of Nisi Prius, together with two other actions, in one of which the infant apprentice sued by his next friend, the costs of the causes to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator awarded that the verdict in the above cause should be entered for the defendant, that the two other actions should be no further prosecuted, and that the infant should pay the costs of the reference and award:—Held, that the award was not bad by reason of its directing an infant to pay costs. *Proudfoot v. Boile*, 3 Dowl. & L. 524, Ex.; 15 Mee. & W. 198.

*Rule for payment of money under an award refused when the validity of award doubtful.]* Where the validity of an award was doubtful, the court refused to make an order for payment of the sum awarded under 1 & 2 Vic. c. 110, s. 18, which would have the effect of a final judgment. *Dickinson v. Allsop*, 13 Mee. & W. 722; 2 Dowl. & L. 657.

*Rule for payment of money under an award—time for the return of.]* The rule calling upon a party residing in the country to pay money on an award is a six-day rule, and the court refused to shorten the time to bring it within the term. *Arthur v. Marshall*, 13 Mee. & W. 465; 2 Dowl. & L. 376.

*M<sup>r</sup>m.* The ground of this decision was that the plaintiff elected to take the rule out of the office with this return, and the court saw no reason for permitting him to change his mind. The practice is to make rules returnable at shorter periods than six or even four days towards the close of term.

*Execution may issue on rule absolute to pay money pursuant to an award.]* The superior courts have power to call on a party to show cause why he should not pay money pursuant to an award; and on a rule for this purpose being made absolute, execution may issue under 1 & 2 Vic. c. 110, s. 18; *Doe v. Amey*, 10 Law J., Ex. 466.

*Setting aside award—form of rule nisi.]* In a rule nisi to set aside an award, it is not necessary to state that it is made upon reading the award or a copy thereof, if the ground for setting it aside does not

appear on the award. And it is not the duty of the officer of the court to decide whether the award or a copy should be mentioned in the rule nisi, but he should draw the rule upon the materials furnished by the party applying for it, who is alone responsible for the sufficiency of those materials. *Guthrie and another v. Bowman*, MS. Exch. H. T. 1845.

The grounds of objection in a rule for setting aside an award must be stated specifically, and not in general terms. As, "that the arbitrator has exceeded his authority, and that the award is uncertain and not final," the reasons why should be stated. *Gray v. Leaf*, 8 Dowl. 654, B. C., and *Boodle v. Davies*, 4 N. & M. 788.

On a motion to set aside a certificate by an arbitrator the like rule prevails, that the grounds of objection be set out in the rule nisi. *Carmichael v. Houchen*, 3 N. & M. 203; and *Whatley v. Morland*, 2 C. & M. 347; 2 Dowl. 249.

On a rule nisi to set aside an award the objection must be specifically pointed out by the rule; unless the general statement of the objection, as "that the arbitrator has exceeded his authority," be aided by specific instances contained in the affidavits. *Staples v. Hay*, 1 Dowl. & L. 711, Q. B.

In a rule nisi for setting aside an award, an objection "that the arbitrator has not awarded on a matter in difference submitted to him" is sufficiently specific. *Dunn v. Warlters*, 9 Mee. & W. 293; 1 Dowl. N. S. 626.

*On motion to set aside award, reference to the record.]* The court may look at the record on an application to set aside an award, pursuant to an order of Nisi Prius, although the rule is not drawn up on reading it. *Sherry v. Oke*, 3 Dowl. 349.

*Time for moving to set aside an award.]* Where by a judge's order a cause only was referred to arbitration, a motion to set aside the award made after the fourth day of the term following the publication of the award was held to be too late, and the court refused to allow affidavits to be filed accounting for the delay. *Riccard v. Kingdon*, 15 Law J., Q. B. 269.

After verdict a motion to set aside an award made in vacation must be within the first four days of the ensuing term. *Thompson v. Jennings*, 10 Moore, 110.

Even though it is for objections apparent on the face of it. *Sell v. Carter*, 2 Dowl. 245.

Unless the award be published too late in the vacation, when it may be set aside after the first four days. *Bennett v. Skardon*, 5 M. & R. 10; *Rawsthorn v. Arnold*, 6 B. & C. 629; 9 D. & R. 556.

Where there is no verdict the motion must be made in the term next following the award. *Emett v. Ogden*, 7 Bing. 258; and *Hayward v. Phillips*, 6 Ad. & Ell. 119; 1 N. & P. 288.

Where an award is bad by reason of extrinsic matter, and not for defects on the face of it, a party disputing the award must move to set it aside within the next term after it is published; and if he fails to do so, he cannot set up such extrinsic matter in answer to a rule for an attachment for non-performance of the award. *M'Arthur v. Campbell*, 5 B. & Ad. 518; 2 Ad. & E. 52; 4 Law J., K. B. 25.

A motion to set aside an award made under an order of a judge

must be made promptly after the party knows of the award being made. Where such a motion was made after two terms had elapsed the court discharged it with costs, though it was alleged by the party moving that he did not believe that the other party intended to proceed upon the award, as there had been a previous revocation. *Worrall v. Deane*, 2 Dowl. 261.

Arbitrations entered into under the authority of rules of court, though not within the statute 9 & 10 Will. 3, c. 15, s. 2, are, by the discretion of the courts, governed by the statute rule as to time. Therefore, a party complaining of such arbitration must move to set it aside before the last day of the next term after the award in such arbitration made and published to the parties:—Semblé, an award may be said to be published, when they who are interested have notice that it is ready for delivery, on payment of reasonable costs. *Musselbrook v. Dunkin*, 2 M. & Sc. 740; 2 Law J., C. P. 71; 9 Bing. 605.

If parties agree to refer, there being an action pending, without a judge's order, the reference is within the 9 & 10 Will. 3, c. 15, and an application to set aside the award must be made before the end of the term next after its publication. *Rushworth v. Barron*, 3 Dowl. 317.

An award made in pursuance of an order of nisi prius, referring a cause and other matters in difference, may be objected to at any time before the end of the term next after publication. In stating the grounds on which it is sought to set aside an award, it is not sufficient to state a general head of objection, as “misapprehension of the terms of the reference.” *Allenby v. Proudlock*, 4 Dowl. 54.

*Award subject to the opinion of the court.]* Where an award is made subject to the opinion of the court, the motion for that purpose must be made within the term next following. *Anderson v. Fuller*, 4 M. & W. 470; 7 Dowl. 51.

*Setting aside an award, wrong decision of a question of law.]* The court will not set aside an award, or send it back to an arbitrator, upon affidavits alleging that he has come to a wrong decision upon a question of law. *Fuller v. Fenwick*, 10 Jur. 1057, C. P.; 16 Law J., C. P. 79.

*Motion to set aside an award, the submission not having been made a rule of court.]* Where an award was made on the 18th of September, and a rule nisi to set it aside obtained on the 24th November, and it appeared that the submission was not, by virtue of the consent clause which it contained, made a rule of court till the 30th of November, the court refused to order the rule of court to be dated as of the 24th, and to enlarge the rule nisi under it to be drawn up on reading the rule of court so dated. *Ross v. Ross*, 16 Law J., Q. B. 138.

*Setting aside award, on a supposed mistake in receiving documentary evidence.]* Where the award was good upon the face of it:—Held, that a supposed mistake in law of the arbitrator in receiving in evidence books, &c., not admissible was not a sufficient ground for the court to set the award aside. *Hagger v. Baker*, 2 Dowl. & L. 856.

*Award set aside where witness was examined in the absence of one party.]* Where an arbitrator questions a witness and receives state-

ments from him in the absence, and without the consent of one party to the reference, the court will set the award aside, without taking into consideration the nature of the statements, or the probability of their having influenced the decision. *Dobson v. Groves*, 6 Q. B. 637.

*Award set aside, the arbitrator without authority directing judgment to be entered.]* After issue joined in an ejectment, the matters at issue in the action, together with all claims in respect of mesne profits, and all matters in difference between the parties, and of the costs of the action, and of the reference, were referred by a judge's order. The award directed judgment to be entered for the plaintiff in the action, with 1*s.* damages, and that the plaintiff should recover, under the same judgment, a plot of land (describing it by metes and bounds), and that the defendant should pay 12*l.* as mesne profits, and the plaintiff's costs in the action to be taxed by the proper officer, and part of the costs of the reference and award:—Held, first, that the arbitrator had no authority to direct judgment to be entered up, and final judgment which had been signed was set aside; but that, rejecting all that related to the judgment, the award sufficiently decided the matters referred. *Doe d. Body v. Cox*, 15 Law J., Q. B. 317.

*Award will not be set aside for a defect not mentioned in rule nisi.] Case.* The declaration stated, that whereas H. wrongfully erected a mill on a close, the reversion whereof belonged to the plaintiff, the defendant wrongfully continued the mill so wrongfully erected thereon, whereby the plaintiff was injured in his reversion. Pleas, not guilty; and that the mill was not wrongfully erected, *modo et formâ*.

The cause was referred to an arbitrator. By the order of reference the arbitrator was to direct how the verdict should be entered on the different issues, with power to order what should be done between the parties. The arbitrator directed a verdict on the first issue for the plaintiff, without damages, and on the second issue for the defendant, and ordered “that nothing be done by the parties”:—Held, that the findings on the issues were not inconsistent and repugnant to each other; and that the arbitrator was justified in ordering that nothing should be done by the parties. Held, also, that though the award was defective for not awarding nominal damages at least; yet as the defect was not made a ground of objection in the rule nisi obtained for setting aside the award, it could not afterwards be raised. *Grenfield v. Edgecomb*, 14 Law J., Q. B. 322.

*Award not set aside for surplusage.]* A cause was referred to three persons to make an award, and in case they should differ, to an umpire. The award contained no statement that the arbitrators had differed, but recited that they had “considered the decision of the umpire”:—Held, that the award was not void in consequence of the mistake, but that the words were surplusage. It appeared on affidavit that they had not consulted the umpire at all:—Held, that the words were merely surplusage, and must be presumed to have been inserted by mistake. *Harlow v. Read*, 14 Law J., C. P. 239.

*Award bad where the arbitrators awarded interest without authority to do so.]* Where the arbitrators found that certain sums were due

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for principal and interest at the time of the reference, in respect of two different funds, and awarded that a gross sum should be paid, without apportioning it between the two funds to which it belonged ; they also awarded interest to be paid in respect of those sums, and went on to direct that certain payment of interest should be made in future :—Held, that the award was bad, for not distinguishing between the two funds in respect of which the parties were entitled to the money found to be due ; and also that they had gone beyond the powers of the submission in awarding interest subsequent to the reference. *In re G. Morphett and another*, 14 Law J., Q. B. 259.

*Award, objection to, notice of meetings.]* One of the parties objected to the award, on the ground that he had not had notice of two meetings, at the first of which no evidence was received, but the arbitrators merely adjourned ; and at the second of which he attended, and handed in a formal protest against the proceedings, upon a ground totally different from that of want of notice :—Held, that he was not entitled to notice of the first meeting, and that he had by his protest waived the want of notice of the second. *In re G. Morphett and another*, 14 Law J., Q. B. 259.

*Award defective where the arbitrator enlarged the time on a copy instead of the original order.]* On a motion for the payment of money under an award, it appeared, that the order of reference authorised the arbitrator to enlarge the time for making his award by his indorsement thereon ; the arbitrator enlarged the time by indorsements on the copy of the order of reference, which was subsequently taken to the judges' clerk, who procured the judges' signature to the copy order, which was then made a rule of court :—Held, that there was no valid enlargement of the time by the arbitrator, and that the rule must be discharged with costs. *Strother v. Steavenson*, MS., Exch. T. T. 1847.

*Irregularity in proceedings of arbitrators waived, if not objected to in time.]* The court refused to set aside an award on the ground of the irregular conduct of the arbitrators, in having examined witnesses in the absence of and without notice to one of the parties to the order of reference, where it appeared, that the party complaining of the irregularity was made acquainted with it three weeks before the award was made, and gave no notice to the arbitrators of his intention to dispute the validity of their award on that account ; and where it further appeared that no substantial injustice had been occasioned by the irregularity. *Bignall v. Gale*, 10 Law J., C. P. 169.

*Award, death of one of the parties previous to making.]* By an order of reference in a cause, the award was to be delivered to the parties, or either of them, or if they or either of them should be dead before the making thereof, to their respective personal representatives who should require the same. One of the parties having died :—Held, that the court had no power to direct the arbitrator to proceed. *Lewin and another v. Holbrook*, 12 Law J., Ex. 267.

*A motion to set aside a judgment signed on an award.]* Where a

party has allowed a term to intervene without applying to set aside an award; and judgment is signed in pursuance of it, it is still competent to him to move to set aside the judgment. *Brooks v. Parsons*, 1 Dowl. & L. 691, Q. B.

*Award omitting to state that the witnesses were sworn, and costs of award.]* Where an arbitrator omitted to state in his award that the evidence he had heard was upon oath, and likewise to whom the costs of the award were to be paid by the unsuccessful party:—Held, that the award was good. *Annan v. Job*, 10 Jur. 926, B. C.—Patteson.

*Award, what amounts to an.]* A number of coach proprietors, who horsed a coach, were in the habit of having monthly accounts made out, containing the name of proprietors, the amount of the receipts and disbursements, the number of miles worked by each, and the proportion of the earnings to which each was entitled. These accounts were made out by the clerk of one of the proprietors, partly from materials furnished by them, and partly from the way-bills; and the practice was for the clerk to send to each proprietor a copy of the monthly account, showing the amount which each had to receive or pay, and the proprietor or proprietors from or to whom he was to receive or pay such amount:—Held, that this account was not an award, and was admissible in evidence without a stamp. *Goodyear v. Simpson*, 15 Mee. & W. 16; 15 Law J., Ex. 191.

BAIL—*Holding to.*

*Affidavit to hold a defendant to bail—by whom to be made.]* The affidavit need not be sworn to by the creditor himself (1 Chit. Rep. 28), and, if made by one of several creditors, it suffices (4 T. R. 176), and may be made without consent of co-creditor (1 Lord Raym. 381). When made by an agent, it is not essential to show his connexion with the creditor, or state that he is agent (1 Chit. Rep. 10; 5 Dowl. 485), or explain his means of knowing the facts disclosed (4 Taunt. 231), provided he swear positively to the existence of the debt. *Short v. Campbell*, 3 Dowl. 487; *Lee v. Sellwood*, 9 Price, 322; *Holliday v. Lawes*, 3 Bing. 541; *James v. Trevanion*, 5 Dowl. 275.

*Affidavit to hold to bail—before whom to be sworn.]* The party administering the oath must be duly authorised, or the defendant will be discharged. *Hughes v. Jones*, 1 B. & Ad. 388.

When sworn before a commissioner of one court in vacation, the judge of another court may grant an order to act upon it. *Griffin v. Taylor*, 6 Dowl. 620.

If sworn before a commissioner he must be correctly described. *Howard v. Brown*, 4 Bing. 393; and *Rex v. Hare*, 13 East, 189.

*Affidavit to hold to bail under stat.* 1 Vic. c. 110.] The deponent must state that he believes the defendant “is about to quit England unless apprehended,” and set forth the grounds for such belief. *Batemann v. Dunn*, 5 Bing. N.S. 49; 7 Dowl. 105; 6 Scott, 739.

The affidavit on which an arrest is to be founded under 1 & 2 Vict.

c. 110, s. 3, need not state that the deponent has probable cause for believing that the defendant is about to quit England. It is enough that the affidavit enables the judge to form that belief. *Willis v. Snook*, 10 Law J., Ex. 266; 8 Mee. & W. 147.

Under the stat. 1 & 2 Vict. c. 110, the criterion is, whether the defendant is about to leave England for a mere temporary purpose, or for so long as would prejudice the plaintiff. *Larchin v. Willan*, 4 Mee. & W. 351; 7 Dowl. 11.

After a judge's order to stay proceedings for a fixed time, the plaintiff cannot arrest under the above statute. *Ball v. Stanley*, 6 Mee. & W. 396.

Mere suspicion that a defendant is about to leave England is not sufficient to authorise an arrest. *Harvey v. O'Meara*, 7 Dowl. 725, B.C.

*Judge's order to hold to bail.]* Under the 1 & 2 Vic. c. 110, s. 3, a judge has discretion to make or not to make an order to hold a defendant to bail, on a plaintiff's showing that he is about to leave England. And where such order has been made, the bail-bond may be cancelled, if it shall appear on the defendant's showing that the intended absence was only temporary, or that the order ought not in discretion to have been made. Under the provisions of section 6, the court has power to set aside any order made by any judge under section 3. *Hitchcock v. Hunter*, 10 Law J., Q. B. 87.

To support a rule by a defendant to rescind (under sect. 6) a judge's order made under 1 & 2 Vic. c. 110, s. 3, he must swear positively that he is not about to leave England.

The court will not allow the defendant's affidavit to be amended after cause is shown against the rule. *Robinson v. Gardner*, 7 Dowl. 716.

*Jurisdiction of the court to review an order to hold to bail.]* The defendant had been arrested on a writ issued by judge's order under 1 & 2 Vic. c. 110, on the ground of his alleged intention to quit the country. It had been submitted to a judge at chambers, that the facts detailed in the affidavit did not warrant the issuing of the order, and he declined to interfere; the question was by motion brought before the court:—Held, that the court has power to review the order, and that as the order was erroneous the defendant was entitled to be discharged. *Graham v. Sandrielli*, 10 Jur. 1061; 16 Law J., Ex. 67.

A party so arrested may take the opinion of a second judge as to the propriety of his being kept in custody, and that opinion is likewise subject to review by the court. *Ib.*

*Capias to hold to bail in a county palatine.]* A judge of the superior courts has power, under the stat. 1 & 2 Vic. c. 110, s. 3, to hold a party to bail within the counties palatine, for a sum between 20*l.* and 50*l.* *Brown v. M'Millan*, 10 Law J., Ex. 147.

*Capias to hold to bail and præcipe—variance in.]* The defendant was arrested and held to bail upon a writ indorsed, “Bail by affidavit,” and specifying the amount of the sum sworn to. The præcipe did not

state the amount of the debt, nor did it refer to the affidavit :—Held, that such difference between the praecipe and the writ was unimportant and immaterial ; and that the latter should not, therefore, be set aside. *Usborne v. Pennell*, 3 Law J., C. P. 174 ; 10 Bing, 531 ; 4 M. & Sc. 431.

*A capias to hold to bail cannot issue on a judgment previous to 1 & 2 Vic. c. 110.]* Where judgment was obtained in an action in 1831, and the defendant went abroad, and remained there until 1842, and the plaintiff then sued out a sci. fa. to revive the judgment, and on that sci. fa. upon an affidavit of the presumed intention of the defendant to quit England, procured a writ of capias, by order of a judge at chambers ; and the defendant was arrested under that writ, the court ordered the defendant to be discharged out of custody : for if proceedings by sci. fa. are merely a continuance of the original action, and do not constitute a new suit, the power to arrest is taken away by the 1 & 2 Vic. c. 110, s. 5 ; and if they are to be viewed as the commencement of a fresh action, no capias can be granted, as the 1 & 2 Vic. c. 110, ss. 2 & 3, refer only to actions where the defendant was liable to arrest at the time of the passing of that act. *Agassiz and Wife v. Palmer*, 1 Dowl. & L. 18, C. P.

*Affidavit of debt including interest in the amount claimed.]* An affidavit of debt claiming part of an integral sum for interest, should show that it arose from some contract for the payment of interest ; and, therefore, an affidavit, stating the debt to be partly “for interest upon and for the forbearance to the said defendant by this deponent, at the said defendant’s request, of monies due and owing from the said defendant to this deponent,” is bad. *Neale v. Snoultten*, 15 Law J., C. P. 48 ; 3 Dowl. & L. 422.

*Affidavits to hold to bail used previously in another cause and court admissible.]* On an application to a baron of the Exchequer to hold a defendant to bail, affidavits used shortly before on a similar application against the same defendant at the suit of another plaintiff, and in another court, were held to be admissible. *Langston v. Wetherell*, 14 Law J. Ex. 229 ; 14 Mee. & W. 104.

*Affidavit for judges’ order to hold to bail.]* An affidavit to hold to bail, under 1 & 2 Vic. c. 110, stated “that the defendant was a lieutenant in the 78th regiment of foot, which regiment is under orders to embark for India ; and deponent believes, and has no doubt, that it is the intention of the defendant to embark with his regiment, and quit England, on military service, for India :”—Held, sufficient. *Askenheim v. Colegrave*, 13 Mee. & W. 620 ; 2 Dowl. & L. 642 ; 14 Law J., Ex. 113.

*Deposit of money in lieu of bail.]* A deposit in lieu of bail after the time of putting in has expired is not equivalent to putting in and perfecting bail, and therefore the plaintiff is entitled to the money. *Hannah v. Willis*, 6 Dowl. 417 ; 4 Bing. N. S. 310.

A plaintiff is not entitled to receive out of court money paid in by

defendant in lieu of bail under the 7 & 8 Geo. 4, c. 71, s. 2, unless judgment has been obtained, or the suit otherwise legally determined. *Johnson v. Wall*, 4 Dowl. 315, B.C.

To entitle a defendant to a return of his deposit in lieu of bail he must have perfected bail in time, but the plaintiff must elect between the money and the bail. *Geech v. Coppin*, 3 Dowl. 74, B. C.

An affidavit by the defendant that bail was justified, is sufficient to entitle him to take the money out of court, unless there be a counter affidavit that it was not justified in time. *Young v. Maltby*, 3 Dowl. 604, B. C.

A party who makes his deposit being privileged from arrest is entitled to have it returned. *Pitt v. Coombs*, 4 N. & M. 535, K. B.

On an application under the 7 & 8 Geo. 4, c. 71, s. 2, to take money and costs out of court which have been deposited in lieu of bail, if the cause is in such a state that issue may be joined before the rule is disposed of, the court will grant it with a stay of proceedings. *Bloor v. Cox*, 6 Dowl. 266, B. C.

Money having been deposited in lieu of bail, and an order for better particulars with a stay of proceedings having remained unobeyed for a year, the court refused to grant a rule for taking the money out of court. *Horden v. Harbourn*, 7 Dowl. 546, B. C.

Where a party goes into custody under 1 & 2 Vic. c. 110, he is not entitled to have the money deposited returned to him. *Harrison v. Dickinson*, 4 Mee. & W. 355; 7 Dowl. 6.

The application to take the money out by the defendant is too late after issue joined. *Ferrall v. Alexander*, 1 Dowl. 132, B. C.; and *Hawell v. Mure*, 2 Dowl. 155, B. C.

A third person who deposits money in lieu of bail is not entitled to take it out after judgment though the defendant renders. *Bull v. Turner*, 4 Dowl. 734; 1 Mee. & W. 47.

The rule to take out of court money deposited in lieu of bail is only nisi. *Grant v. Willis*, 4 Dowl. 581, B. C.

Where a defendant has deposited money in court pursuant to 7 & 8 Geo. 4, c. 71, s. 2, to abide the event of the suit, and he succeeds, the rule for taking the money out of court is nisi in the first instance. *Lover v. Tolmin*, 5 Dowl. 388, B. C.

Where money has been paid into court pursuant to the 7 & 8 Geo. 4, c. 71, and a rule for judgment as in case of a nonsuit is moved for, the court will not add to that rule an application to take the money out of court, but that must be the subject of a separate rule, after the former has been decided. *De Bedolliere v. Ryan*, 7 Dowl. 615, B. C.

The court has no power to direct money deposited in lieu of bail to be transferred to a payment into court on account of a plea of tender. *Stultz v. Heneage*, 2 Dowl. 806; 10 Bing. 561; 4 M. & Sc. 472.

Where money is paid into court in lieu of bail, not by the defendant himself, but by one of the bail, and the plaintiff obtains judgment, he is entitled to have the money paid out to him in discharge of the debt and costs. *Bull v. Turner*, 1 Mee. & W. 47.

*Costs of rule for taking money out of court deposited in lieu of bail, and of two rules by defendant.]* The defendant being held to bail for the amount of a bill of exchange, paid the sheriff the sum indorsed

on the writ, and 10*l.* for costs, under the statute 43 Geo. 3, c. 46, s. 2, but neglected to perfect special bail, or deposit the sum in lieu of bail under the statute 7 & 8 Geo. 4, c. 71, s. 2, and the plaintiff obtained a rule, which, upon cause shown, was made absolute for taking the money out of court, which he accordingly did. The defendant obtained a rule, calling upon the plaintiff to show cause why the money taken out, with a further sum of 10*l.* paid into court, should not be deemed equivalent to putting in and perfecting special bail, which rule, upon discussion, was discharged. Nothing was said about costs in either of these rules. Finally, the defendant obtained a rule for delivering up the bill of exchange on which the litigation arose, and the payment of the 10*l.* in the hands of the officer, upon payment of interest on the said bill, with costs to be taxed by the officer. Upon taxation of costs, the master having refused to allow the plaintiff his costs on either of the three rules:—Held, that he was right in refusing him the costs of the rule for taking the money out of court, and of showing cause against the rule for considering the sums paid in equivalent to putting in and perfecting special bail, inasmuch as those rules were not to be considered as in the course and progress of the cause; consequently, upon these points the taxation should not be reviewed; but that the plaintiff was entitled to the costs of the rule for delivering up the bill of exchange, both by the terms of the rule, and because it was obtained and drawn up for the benefit of the defendant; and consequently, upon this point, that the taxation should be reviewed. *Hannah v. Willis*, 8 Law J., C. P. 233; 5 Bing. N. C. 385; 7 Scott, 357.

*Money deposited in lieu of bail, taken out after verdict and before execution.]* Where money was deposited in court in lieu of putting in and perfecting bail, pursuant to the statute, and the plaintiff obtained a verdict:—Held, that he was not at liberty to issue execution for the whole sum recovered, but was bound to take the sum deposited out of court, and to limit his execution to the surplus only. *Hews v. Pyke*, 2 C. & J. 359.

*Justifying bail—property.]* Shares in a railway company in actual operation are property in respect of which bail may justify. *Pierrepont v. Brewer*, 10 Jur., Ex. 79; 15 Law J., Ex. 81; 3 Dowl. & L. 487.

*Bail on foreign attachment.]* If one of several defendants removes a foreign attachment by certiorari, he must put in bail for his co-defendants. *Keat v. Goldstein*, 1 M. & Ry. 305; 7 B. & C. 525.

*Bail in error.]* On motion for leave to deposit money in court in lieu of bail in error, the court said the statute as to a deposit in lieu of bail did not apply to bail in error, and could only be done by consent. *Collins v. Gwynne*, 2 M. & Sc. 775. So it seems with respect to causes removed from an inferior court. *Morgan v. Pedler*, 4 Dowl. 645, C. P.

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ception to the direction of a judge must set out in terms what the judge's direction was; it is not sufficient to state that the counsel requested the judge to leave certain questions to the jury, and that he refused to do so. *M'Alpine v. Mangnall*, 15 Law J., Ex. Ch. 298.

*Bill of exceptions not sealed by reason of the death of the judge.]* Where a bill of exceptions had been tendered at the trial, and the same had remained with the judge unsigned until the day of his death, the court allowed the question as to the validity of his lordship's direction to be discussed on a motion for a new trial, although several terms had elapsed from the day the cause was tried. *Newton and Wife v. Boodle and others*, 11 Jur. C. P. 148; 16 Law J., C. P. 135.

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*Certificate at Nisi Prius to try a right—when may be made.]* An application having been made to a judge at Nisi Prius, to certify under the 3 & 4 Vic. c. 24, that the action was brought to try a right, &c., the judge consented to grant the certificate, but the associate omitted to make any indorsement on the record. Two years afterwards the certificate was drawn up and signed by the said judge:— Held, that as the application for the certificate was made and granted in open court, it must be considered that the parties consented to its proper entry on the record. *Jones v. Williams*, 2 Dowl. & L. 247, Ex.

In order to entitle the plaintiff to costs under the stat. 3 & 4 Vic. c. 24, a certificate, that an action was really brought to try a right is valid, although not applied for until one of the jurors in another cause has been sworn, and not actually given until the whole are sworn; and although the verdict was taken late at night by the associate, after the judge and counsel had retired, and the application was not made until the following morning. *Helmes v. Hedges and another*, 12 Law J., Q. B. 100; 2 Dowl. N. S. 350.

*Certificate for costs refused at Nisi Prius—application to the court.]* The 3 & 4 Vic. c. 24, applies to actions of trespass and trespass on the case; and if the judge refuses to certify, the court has no power. *Marriot v. Stanley*, 2 Scott N. S. 60; 9 Dowl. 59.

*Certificate granted at Nisi Prius—application to the court.]* The court will not set aside a judge's certificate under 43 Eliz. c. 6, to deprive the plaintiff of costs, if the judge has power to certify, although the certificate may have been granted on an erroneous ground. *Cann v. Facey*, 5 N. & M. 405.

*Judge's certificate at Nisi Prius under 3 & 4 Vic. c. 24.]* A judge has the power of certifying under 3 & 4 Vic. c. 24, s. 2, in all cases where it appears from the declaration that the action may have been brought to try a right, although no question of right may be raised in the subsequent pleadings. And if the certificate is informally drawn up at the trial, it may be amended afterwards; and that, too, after a rule nisi has been granted for setting it aside. *Shuttleworth v. Cocker*, 10 Law J., C. P. 1; 9 Dowl. 76.

*Certificate for costs by judge at Nisi Prius or by an arbitrator.]* Under the 3 & 4 Vic. c. 24, s. 2, a judge at Nisi Prius has an unfettered discretion to grant or refuse to the plaintiff in an action, suggested to be brought to try a right, his certificate for costs, and that the action was really brought to try a right ; therefore, where a cause is referred to arbitration, and the order of reference gives to the arbitrator the same power as a judge at Nisi Prius, and the arbitrator refuses to grant such a certificate, the court will not interpose to control his discretion. *Bury v. Dunn*, 1 Dowl. & L. 141, Q. B.

*Certificate at Nisi Prius to entitle plaintiff to costs—when must be given.]* The words "immediately afterwards," in the 3 & 4 Vic. c. 24, mean that the judge must certify within such convenient time after the verdict as excludes from his mind the operation of matters foreign to the case.

Therefore where the judge, having disposed of the last cause for the day adjourned the court, and retired to his lodgings, where, within a quarter of an hour after the verdict, he granted a certificate for costs in that cause, on the application of the plaintiff's counsel :—Held, that he had authority to do so under the statute. *Thompson v. Gibson and another*, 8 Mee. & W. 281 ; 10 Law J., Ex. 241 ; and *Page v. Pearce*, 10 Law J., Ex. 434 ; 8 Mee. & W. 677.

On a motion to set aside the certificate of the under-sheriff of Yorkshire, the taxation of costs thereon, and to refund 43*l.*, paid by the defendant under protest, the under-sheriff having told the defendant at the rising of the court that he should not give a certificate, but afterwards, on looking into the cases, thought he might certify and did ; the court made the rule absolute, and intimated that when a judge at the trial takes time to consider whether he will certify, he must do so publicly and distinctly. *Petty v. Walker and others*, MS. Exch. H. T. 1845.

*Certificate at Nisi Prius to deprive plaintiff of costs, when may be given.]* In trespass, the plaintiff recovered less than 40*s.* damages, and the judge at the trial intimated his intention of certifying to deprive the plaintiff of costs, under the 43 Eliz. c. 6, but after four days the plaintiff obtained the record from the associate, no certificate being indorsed on it, and signed judgment ; and the master, on production of the record, taxed the plaintiff his costs. The court confirmed an order of the judge for producing the record before him, in order to indorse the certificate upon it, and for setting aside the judgment and taxation. *Davis v. Cole*, 6 Mee. & W. 624 ; 8 Dowl. 732.

*Certificate for costs on the higher scale, when may be given.]* Where the verdict is under 10*l.*, a certificate of the cause being fit to be tried before a superior court may be given at any time. *Ivey v. Young*, 5 Dowl. 450.

*Certificate for costs on writ of inquiry before the sheriff, signature to.]* The sheriff to whom a writ of inquiry is directed ought to certify in his own name, under the 3 & 4 Vic. c. 24, s. 2, in order to

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give the plaintiff full costs, where the damages are less than 40s., although the writ of inquiry be not executed by himself in person, but by his deputy. *Stroud v. Watts*, 10 Jur., C. P. 497.

The 43 Eliz. c. 6, s. 2, only empowers the judge who tries the cause to give the certificate under that act, to deprive the plaintiff of costs. And in case of executing a writ of inquiry, whether before a judge or a sheriff, the certificate cannot be granted. *Claridge v. Smith*, 4 Dowl. 583.

*Certificate at Nisi Prius in ejectment.]* By the stat. 11 Geo. 4, and 1 Will. 4, c. 70, s. 38, it is enacted, that in all cases of trials of ejectment at Nisi Prius, when the verdict is given for the plaintiff, or the plaintiff is non-suited for the want of the defendant's appearance to confess lease, entry and ouster, the judge may certify his opinion on the back of the record, that a writ of possession ought to issue immediately, and upon such certificate a writ of possession may issue immediately, and the costs may be taxed and judgment signed and executed afterwards at the usual time as if no such writ had issued. If the lessor of the plaintiff is non-suited for want of confession of lease, entry and ouster, the judge will not grant a certificate under the statute without an affidavit of the circumstances. *Doe d. Williamson v. Dawson*, 4 Car. & P. 589.

The judge has no discretion as to the time at which the lessor of the plaintiff shall have possession; he must either certify for immediate possession, or let the case take its regular course. *Ib.*

But if the judge should think that some time ought to be allowed to the defendant, he will grant a certificate for immediate possession, the lessor of the plaintiff undertaking not to enforce it for a certain time. *Doe d. Parker v. Hilliard*, 5 Car. & P. 122.

After a verdict in ejectment for the lessor of the plaintiff, an application was made for a certificate under 3 & 4 Vic. c. 24, that a right came in question. Per Parke, B.: "I will give it as there may be a question whether it is necessary." *Doe d. Hughes and another v. Derry*, 9 Car. & P. 494.

*Certificate in an action for the infringement of a patent.]* If in an action for the infringement of a patent, the defendant plead not guilty, that the invention was not new, and that the specification is not sufficient; and the defendant at the trial consent to a verdict for the plaintiff, without any evidence being given, the judge will not certify under the stat. 5 & 6 Will. 4, c. 83, s. 3, "that the validity of the patent came in question before him." *Stocker and another v. Rogers and another*, 1 Car. & K. 99—Erskine, J.

*Certificate in trespass after notice.]* If, in trespass, the damages recovered be under 40s., and the judge does not certify that the trespass was wilful and malicious, proof that written notice not to trespass had been previously given will not entitle the plaintiff to full costs. *Daw v. Hole*, 15 Law J., Q. B. 32.

The contrary has been subsequently ruled by the court of Common Pleas. Where, in trespass, the plaintiff recovers, after notice before action not to trespass, he is, since the 3 & 4 Vic. c. 24, entitled to costs, although the damages are under 40s. and the judge does not

certify. The proper course to obtain the costs is for the plaintiff to enter a suggestion on the record of such notice having been given. *Bowyer v. Cook*, 11 Jur. 333.

In an action for a trespass committed after verbal notice, a judge has power to certify under 3 & 4 Vic. c. 24, s. 2, that the trespass was wilful and malicious, notwithstanding sec. 3.

Semblé, that in cases of notice in writing within sec. 3, the fact of such notice must appear on the face of the declaration, or there must be a suggestion entered on the record. *Sherwin v. Swindall*, 13 Law J. Ex. 237; 1 Dowl. & L. 999; Parke, B.

*Certificate subsequently annulled by the judge who had granted same.]* Where, after the judge had certified under the 43 Eliz. c. 6, to deprive the plaintiff of costs, but facts were afterwards at chambers sworn by affidavits which did not appear at the trial, the certificate ordered to be annulled. *Anderson v. Sherwin*, 7 C. & P. 339.

It has since been held, that if a judge may revoke his certificate, it should be done within a reasonable time of the granting of the certificate, and before the rights of the defendant can be affected, and his situation changed by such rescinding. *Whalley v. Williamson*, 5 Bing. N. S. 290; 7 Dowl. 253.

*Certificate by judge at Nisi Prius—court cannot review the discretion of the judge.]* The court has no jurisdiction to review the discretion exercised by a judge at Nisi Prius, in granting a certificate for costs, under the stat. 3 & 4 Vic. c. 24, s. 2. *Barker v. Hollier*, 10 Law J., Ex. 474; 8 Mee. & W. 513; and *Marriott v. Stanley*, 2 Scott N. S. 60; 9 Dowl. 59.

*Certificate for costs in libel.]* In an action for libel, the judge has power to certify, under 3 & 4 Vic. c. 24, s. 2, that the grievance for which the action was brought was wilful and malicious. The words of the statute, "wilful and malicious," import personal malice and ill-will to the plaintiff, as contradistinguished from the malice in law, which is essential to sustain an action for libel. *Foster v. Pointer*, 8 Mee. & W. 395.

Where in an action for a libel, to which the defendant had pleaded the general issue and pleas of justification, the jury found a verdict for the plaintiff, damages one farthing; and the judge refused to certify under 3 & 4 Vic. c. 24, s. 2:—Held, that the plaintiff was not entitled to any costs. *Newton v. Roe*, 2 Dowl. and L. 815, C. P.

In a similar case the judge certified under the 43 Eliz. c. 6, to deprive the plaintiff of costs. *Simpson v. Hurdis*, 2 Mee. & W. 84; 5 Dowl. 304.

*Certificate for special jury, when to be given.]* The words in the 6 Geo. 4, c. 50, s. 34, as to the costs of a special jury, unless the judge "shall immediately after the verdict certify, &c." mean that the judge shall certify within a reasonable time after. *Christie v. Richardson*, 10 Mee. & W. 688.

*Certificate for special jury.]* The 24 Geo. 2, c. 18, s. 1, gives the power of certifying for costs of a special jury only to the judge after

## CERTIFICATE.

trial. The court held, therefore, that the judge had no power where the jury is withdrawn. *Clements v. George*, 11 Moore, 510.

The stat. 6 Geo. 4, c. 50, enacts, "That the party who shall apply for a special jury shall pay the costs occasioned thereby, unless the judge before whom the case is tried shall, immediately after the verdict, certify." The court held, that a defendant who had applied for a special jury was not entitled to the costs of that jury, where the judge who tried the cause nonsuited the plaintiff on his opening. *Wood v. Grimwood*, 10 B. & C. 699.

Semblé, that an action for a libel in a newspaper is a fit case to be tried by a special jury, if there be special pleas of justification, but not if the general issue only be pleaded. *Roberts v. Brown*, 6 C. & P. 757.

Where a case turned solely on a question of law, and there was no fact in dispute between the parties, the lord chief justice refused to certify for the special jury. *Wemys v. Greenwood*, 2 C. & P. 483.

And where, on account of the witnesses not appearing on their subpœnas, the plaintiff is nonsuited in an action for penalties, the judge cannot certify for a special jury merely on view of the record, or the names and rank of the witnesses. *Orme v. Crockford*, 1 C. & P. 537.

*Certificate for a special jury by an arbitrator.]* An arbitrator to whom a cause is referred with all the powers of a judge at Nisi Prius cannot give a certificate for the costs of a special jury after he has made and published his award without providing for them therein. *Geerves v. Gorton*, 15 Mee. & W. 186; 15 Law J. Ex. 169; 3 Dowl. & L. 481.

*Certificate for special jury granted but not signed in due time.]* Where a judge had acceded to an application to certify for a special jury, and the indorsement was made by the officer of the court, but the record was not handed up to the judge for his signature, which signature was asked for and added some weeks afterwards, when the party applying for the certificate had obtained the record and discovered the omission:—Held, that this was not a certifying under the judge's hand "immediately after verdict," in the words of 6 Geo. 4, c. 50, s. 34. *Grace v. Clinch*, 12 Law J., Q. B. 273.

*Certificate for costs by sheriff under 3 & 4 Vic. c. 24—setting aside.]* Upon an application to set aside a certificate for costs granted by the sheriff, under 3 & 4 Vic. c. 24, upon the ground that the sheriff had at first refused the certificate, and was afterwards induced to grant it, in deference to the judgment of others, the court will require the facts to be established beyond all doubt. The proper mode in such case would be, that the party making the application should first ascertain, from the sheriff himself, what took place. *Pryme v. Brown*, 11 Law J., C. P. 227.

*Certificate for speedy execution where a bill of exceptions tendered.]* After one defendant had tendered a bill of exceptions a certificate for speedy execution was refused; but the judge afterwards allowed it, as the effect might otherwise be, that in every case it would be done, and defeat the application. *Dresser v. Clarke*, 1 Car. & K. 569.

*Certificate to deprive plaintiff of costs of unnecessary counts in declaration.]* The application for a certificate under the 7th rule of Hilary term, 4 Will. 4, that counts were introduced into the declaration upon which no distinct subject-matter of complaint was bona fide intended to be established in respect of each count, should be made to the judge by whom the cause is tried, and not to the court: and semble, the application should be made at chambers, not in court at nisi prius. *Jackson v. Galloway*, 8 Law J., C. P. 29.

This certificate is only given where upon the trial the plaintiff fails to establish a distinct subject-matter of complaint in respect of each count. Where, therefore, there are two counts, with respect to one of which there is no issue of fact to be tried, and the plaintiff succeeds on the other, the judge cannot grant a certificate against him. *Head v. Baldrey*, 9 Law J., Q. B. 221; 3 P. & D. 625.

## COGNOVIT.

*Attestation of a cognovit.]* Under the 1 & 2 Vic. c. 110, the attorney to attest a cognovit must be an attorney "other" than that of the plaintiff. *Mason v. Riddle*, 8 Dowl. 207; 5 Mee. & W. 513.

And cannot be named by the clerk of the plaintiff's attorney. *Barnes v. Pendrey*, 7 Dowl. 747, Q. B.

The party acting for the defendant must be quite unconnected with the plaintiff's attorney. *Rice v. Linsted*, 7 Dowl. 153, C. P.

If a defendant request an attorney to be sent for, and he be alone with the attorney, who explains the nature of the document, that is sufficient within the statute. *Pease v. Wells*, 8 Dowl. 626, B. C.

The attestation must be that he subscribes as "such attorney" for the defendant. *Poole v. Hobbs*, 8 Dowl. 113, Q. B.

The attestation of the attorney to a cognovit must not only state that he is the attorney for the party executing it, but also that he subscribes his name as such attorney. *Potter v. Nicholson*, 8 Mee. & W. 294.

If the attestation states the attorney to be the attorney of the defendant, who has been accepted by the defendant, that is sufficient. *Oliver v. Woodruffe*, 7 Dowl. 166; 4 Mee. & W. 650.

An attorney for the defendant merely being present will not do; he must subscribe his name as such. *Fisher v. Papanicholas*, 2 C. & M. 215; 2 Dowl. 251.

In subsequent cases it has been held sufficient for the attorney to declare verbally he subscribes for the defendant. *Wallace v. Brockley*, 5 Dowl. 695, Q. B.; and *Robinson v. Brooksbank*, 4 Dowl. 395, Ex.

Signing "as attorney for such defendant" is sufficient. *Lees v. Fry*, 1 T. & G. 1084, Ex.

Where a cognovit is executed by a prisoner, the court requires it to be proved that the attorney who attends on his behalf was expressly named by him, according to the rule H. T. 2 Will. 4, c. 72, and will not be satisfied with a mere inference thereof.

But where a defendant in custody was about to execute a cognovit, and the plaintiff's attorney suggested another attorney to act for him, (his own attorney not being in the way,) to whom the defendant made no objection, but went to his office, and being asked by that attorney if he wished him to attest the execution as his attorney, answered in the affirmative:—Held, that this was an express naming of the attorney

within the rule. *Bligh v. Brewer*, 1 C. M. & R. 651; 5 Tyrw. 222.

It is not necessary that the attorney who attends on behalf of a prisoner to explain and attest a cognovit should make the declaration required by the rule H. T. 2 Will. 4, s. 72, in writing on the cognovit. *Robinson v. Brooksbank*, 4 Dowl. 395.

The rule as to the presence of attorneys at the execution of cognovits by prisoners does not apply to defendants in custody on final process; and the fact of a summons having issued on the judgment is immaterial. *Fraunce v. Clarkson*, 5 Dowl. 699.

Under the statute 1 & 2 Vic. c. 110, s. 9, the attestation to a warrant of attorney or cognovit must contain words which show with certainty that the subscribing attorney is the attorney of the person executing it, and that he attests or subscribes the execution thereof as the attorney of such person. *Hibbert v. Barton*, 10 Mee. & W. 678; 12 Law J., Ex. 70.

A double attestation (the first being insufficient under 1 & 2 Vic. c. 110, s. 9) does not invalidate a cognovit or warrant of attorney. And where a cognovit was signed by W. T., and attested thus: "Witness, J. Bryant, of ——, attorney-at-law." "Signed in the presence of me, the undersigned; and I hereby certify and declare, that I am the attorney of the said W. T., and that I attended at his request to inform him of this cognovit, and that I have informed him of the nature and effect hereof; and I hereby subscribe my name as his attorney—R. Rowdy:"—It was held, that the word "signed" must be construed to refer to the signature of the party executing the cognovit, and not to that of the witness Bryant, and therefore that the second attestation was sufficient on the face of it. *Ledgard v. Thompson*, 12 Law J., Ex. 229.

*See also Attestation of warrant of attorney.*

*The terms of a cognovit are binding.]* If the terms of a cognovit be not to bring error or delay execution it is binding. *Best v. Gompertz*, 2 C. & M. 427; 2 Dowl. 395.

*In default of payment of any instalment on cognovit, execution for the whole.]* If the terms of a cognovit be, that execution may issue upon default in payment of £—— by instalments, execution may issue for the whole amount, on any default. *Rose v. Tombleson*, 3 Dowl. 49, B. C.

*Cognovit, filing of—execution.]* Where a party taking a cognovit neglects to file it within twenty-one days, it cannot in any case be made available in the event of the subsequent bankruptcy or insolvency of the party giving it; not even when the judgment has been entered up, execution issued, and seizure and sale effected long before the act of bankruptcy or imprisonment of such party, and no fraud is suggested. Where the proceeds of the sale have been paid over to the execution creditor, before the bankruptcy or insolvency of the party giving a cognovit, the assignees subsequently appointed may recover such proceeds in an action for money had and received. *Biffin and another, assignees, v. Yorke*, 12 Law J., C. P. 162.

*Cognovit filed may be proved by an examined copy.]* A cognovit

which is filed may be proved by putting in an examined copy without producing the original, and the subscribing witness may prove that he saw the party sign a cognovit, of which the paper produced is a copy. *Scott v. Lewis*, 7 C. & P. 347—Coleridge, J.

*Cognovit in an action on the case—inquiry by the master of the damages.]* A cognovit in an action for damages is considered as a penalty, and the court will direct the master to see what damage has been sustained. *Charrington v. Laing*, 6 Bing. 242; 3 M. & P. 587.

*When a cognovit may be given.]* To ground a cognovit, process must be sued out, but need not be served. *Kerbey v. Jenkins*, 2 Tyrw. 499.

A cognovit may be given before declaration. *Morley v. Hall*, 2 Dowl. 494.

A cognovit may be given at any time after process has issued, even after four months have elapsed from the time of its teste. *Richardson v. Daly and another*, 4 Mee. & W. 384.

*Cognovit may be given by a debtor in execution.]* A cognovit given by a debtor in execution, in consideration of his being discharged, is a valid instrument, if founded upon a writ sued out; and it lies upon the party impeaching the cognovit to show that no writ was actually sued out. *Shanley v. Colwell*, 6 Mee. & W. 543; 9 Law J., Ex. 176; 8 Dowl. 373.

*A cognovit with surety undertaking to render the principal.]* A cognovit was payable by instalments; a surety agreed to render the principal within seven days after default, upon any instalment not being paid:—Held, that the surety was only bound to render the principal once, and not upon a subsequent default. *Turner v. Payne*, 3 N. & M. 354; 1 Ad. & E. 34.

*A cognovit given under duress.]* If a party, under a belief that he is under duress, executes a cognovit, it will be set aside. *Turner v. Shaw*, 2 Dowl. 244, Ex.

*Setting aside a cognovit for want of a stamp.]* On a motion to set aside a cognovit, on the ground of no stamp, it suffices if it be stamped before cause shown. *Clarke v. Jones*, 3 Dowl. 277, Ex.; and *Rose v. Tomblinson*, 3 Dowl. 49, Q. B.

*Taxing costs on cognovit.]* It seems that the rule T. T. 1 Will. 4, requiring one day's notice to tax, does not apply to the taxation of costs on a cognovit. *Clothier v. Ess*, 2 D. & C. 731; 3 M. & Sc. 216.

## COMPUTATION OF TIME.

*Computation of time for goods sold.]* Goods were sold on the 5th of October, to be paid for in two months:—Held, that an action for the price could not be commenced until after the expiration of the 5th of December. *Webb v. Fairmaner*, 3 Mee. & W. 473.

In legal matters, a month means a lunar month; but in commercial matters, a month always means a calendar month. *Hart v. Midleton*, 2 Car. & K. 9—*Pollock, L. C. B.*

*Computation of time in expiration of a patent.]* Original letters patent, for a term of fourteen years, were dated on the 26th of February, 1825; and renewed letters patent were dated on the 26th February, 1839:—Held, that the day of the date must be reckoned inclusively, and that the former term expired on the 25th of February, 1839, and, consequently, the renewed letters patent were granted after the original letters patent had expired. *Russell v. Ledsam*, 14 Mee. & W. 574.

*Computation of time for bringing action under Tithe Commutation Act.]* Seemle, that the issuing and not the service of a writ of summons is the commencement of an action, brought with a view of appealing against the decision of a tithe comissioner under 6 & 7 Will. 4, c. 71, s. 46.

But the court will not grant a motion for setting aside such writ, though it issued on the 9th June, nearly three months after the decision of the commissioner had been notified, and was not served till the 2nd of September following, an assizes having in the mean time elapsed. *Barker v. Birch*, 12 Law J., C. P. 1.

*Computation of time in pleading—Christmas holidays intervening.]* Where a declaration is delivered on the 24th of December, the plaintiff is entitled to sign judgment on the 3rd of January; and a plaintiff having neglected to do so under the erroneous supposition that the Christmas holidays were to be reckoned in computing the time for pleading, and the defendant having died before judgment was signed:—Held, that the plaintiff could not afterwards enter up judgment nunc pro tunc. *Wilks v. Perks*, 12 Law J., C. P. 145.

## CONSOLIDATION OF ACTIONS.

*Consolidation of actions—plaintiff's consent necessary.]* Two actions having been brought by the same plaintiffs against different defendants, on different policies of insurance, on the same ship, the court would not consolidate them at the instance of the defendants, without the consent of the plaintiffs. *M'Gregor v. Horsfall* and *M'Gregor v. Smith*, 3 Mee. & W. 320; 7 Law J., Ex. 71; 6 Dowl. 338.

*Consolidation rule—trial of second action refused, where one had been twice tried.]* The court having granted a new trial, on the ground that the verdict was against evidence, in a question of sea-worthiness, and having refused a second new trial upon a verdict the same way upon the same evidence,—refused also, to open the consolidation rule, and re-try the same question, in another action against another underwriter on the same policy. *Foster v. Alvez*, 3 Bing. N. C. 896; 4 Scott, 535.

*Consolidation of actions on policies of assurance.]* Where actions against underwriters have been consolidated by rule of court, and the

defendant has obtained a verdict in one, the court will not restrain the plaintiff from trying a second cause, included in the same rule, till the costs of the first are paid. *Doyle v. Douglas*, 4 B. & Ad. 544; and *Long v. Douglas*, *ib.* 545.

Where a plaintiff brings several actions upon the same policy of assurance, against several underwriters, the court will not, without the consent of the plaintiff, make a consolidation rule upon the terms of both plaintiff and defendant being bound in all the actions by the event of one. *Doyle v. Anderson* and *Doyle v. Stewart*, 1 Ad. & E. 635; 4 N. & M. 873.

*Consolidation of several actions by the same plaintiffs—power of the court.]* The plaintiffs had brought ten separate actions of indebitatus assumpsit against ten separate defendants, for certain tolls, port dues, anchorage, buoyage, and other duties, alleged to be incurred by them individually, as commanders of their respective vessels:—Held, that the court had no power, at the request of the defendants, to consolidate the above actions; although it was sworn that the actions were brought in respect of the same right, and that the trial of one would decide the right in all. *The Corporation of Saltash v. Jackman*, 1 Dowl. & L. 851, Q. B.; 13 Law J., Q. B. 105.

### COSTS.

*Security for costs, affidavit for.]* The affidavit stating that the plaintiff is residing out of the jurisdiction, as the deponent is informed and believes, is insufficient; and the rule having been discharged for defect in the affidavit, could not be renewed on an amended one. *Joynes v. Collinson*, 2 Dowl. & L. 449; 13 Mee. & W. 558, and *Sandys v. Hohler*, 6 Dowl. 274.

The affidavit in support of a motion for security for costs must show in what stage the proceedings are. *Huntley v. Bulmer*, 6 Scott, 247.

The absence of a plaintiff abroad, unless it is shown to be of a permanent character, is not a ground for compelling him to give security for costs. *Frodsham v. Myers*, 4 Dowl. 280.

It is not necessary for a defendant to show the stage of the proceedings, in order to obtain a rule nisi for security for costs. *Cole v. Beardy*, 5 Dowl. 161.

A rule nisi for security for costs will be granted, though the affidavit do not state in what stage the cause is, the motion being at the defendant's peril if too late. *Cole v. Perry*, 1 T. & G. 1000.

*Security for costs, time of applying for.]* Where in an action on a bond, the defendant, after demand of over and before plea, applied for security, the defendant residing in Dublin:—Held, not too late. *West v. Cooke*, 2 Dowl. & L. 834.

By the 18th rule of H. T. 2 Will. 4, an application to compel the plaintiff to give security for costs, must in ordinary cases be made before issue joined. *Dowling v. Harrison*, 6 Mee. & W. 131; 8 Dowl. 165.

It is too late to apply for security for costs after judgment for want of a plea. *Bohrs v. Sessions*, 2 Dowl. 710.

A rule for security for costs may be obtained after an order for time

to plead. *Wilson v. Minchin*, 2 C. & J. 87; 1 Law J., Ex. 39; 1 Dowl. 299, and *Gurney v. Key*, 3 Dowl. 559.

Where a defendant pleads, after it has come to his knowledge that the plaintiff is abroad, the court will not oblige the latter to give security for costs. *Brown v. Wright*, 1 Dowl. 95.

As the defendant makes the motion for security for costs at his peril, should it be too late, his affidavit need not state in what stage the proceedings are, but it is for the plaintiff to show that the application is out of time. *Jones v. Jones*, 2 C. & J. 207; 1 Law J., Ex. 77; 2 Tyrw. 216.

Before applying to the court to compel a party to give security for costs, application should be made to the party. *Adams v. Brown*, 1 Law J., C. P. 167; 2 Mo. & Sc. 154; 1 Dowl. 273.

*Security for costs under an interpleader rule.]* A party made defendant under an interpleader rule is entitled to security for costs against a plaintiff, a foreigner, although the original had not required security. *Benazech v. Bassett*, 14 Law J., C. P. 148; 2 Dowl. & L. 801.

*Security for costs—record by proviso—discontinuance by defendant's insolvency.]* As a general rule, a defendant cannot be called on to give security for costs; and the circumstance of his taking the record down by proviso, does not constitute him an actor, so as to take the case out of the rule.

Nor will a plaintiff be allowed to discontinue, without payment of costs, on the ground of the defendant's insolvency, where he has taken a step in the cause after notice of such insolvency. *Ford v. Stott*, 11 Law J., Q. B. 235.

*Security for costs—poverty not sufficient for.]* It is no sufficient ground for applying to this court to compel the plaintiff to give security for costs, that he is in extremely destitute circumstances, and wandering about from place to place without a home, and that he had stated when last seen that he knew nothing about the action, and that it was carried on by the attorney entirely on his own authority, and without any direction or sanction from him. *Armitage v. Grafton*, 10 Jur. 377, B. C.; Williams, J.

A plaintiff will not be compelled to give security for costs on account of his poverty, or because the defendant is unable to ascertain the place of his abode. *Ross v. Jacques*, 10 Law J., Ex. 306; 8 Mee. & W. 135.

*Security for costs—application for.]* An application to compel the plaintiff to give security for costs, on the ground of his residing out of the jurisdiction of the court, may be made after an order has been obtained for time to plead on the usual terms.

But the court will not grant such an application, where the plaintiff, though a foreigner, and usually residing abroad, is at the time actually in this country. Semble, that the affidavit to ground such an application is sufficient, if it states that the deponent believes the plaintiff resides abroad. *Dowling v. Harman*, 6 Mee. & W. 131; 9 Law J., Ex. 53; 8 Dowl. 165.

The court by the 98th rule of H. T. 2 Will. 4, has a discretionary power to require security for costs, notwithstanding that the defendant has proceeded in the cause after he knew that the plaintiff resided abroad. *Fletchew v. Lew*, 5 N. & M. 351; 3 Ad. & E. 551.

Security does not apply to passed costs, nor will further security be required for a new trial. *Oxenden v. Cropper*, 4 Dowl. 574.

An admission by the defendant of the debt is no answer to an application for security. *Edinbro' & Leith Company v. Dawson*, 7 Dowl. 573, B. C.

A party will not be called on to find security on the ground that the proceedings are instigated at the instance of another. *Hearsay v. Pechell*, 5 Bing. N. S. 466; 7 Dowl. 437.

But where it appeared that the plaintiff was in very poor circumstances, and the action was carried on at the instance of another party, the court ordered security for costs to be given. *Ball v. Ross*, 1 M. & G. 445; 1 Scott, N. C. 217.

A foreign king residing out of this country must find security. *Emperor of Brazil v. Robinson*, 5 Dowl. 522; 1 N. & P. 817; and *Otho, King of Greece v. Wright*, 6 Dowl. 12.

A peer of the realm is not bound to give security for costs, though resident abroad. *Earl of Ferrers v. Robins*, 2 Dowl. 636, Ex.

It is no ground for requiring security that the plaintiffs have compounded with their creditors, and the circumstance of one being resident abroad, carries the case no further. *Thomel v. Rollants*, 2 Man. Gr. & Sc. 290.

If a plaintiff be permanently resident abroad, and is only occasionally in this country, he will be liable to give security for costs. *Gurney v. Key*, 3 Dowl. 559.

A plaintiff cannot be required to give security for costs, unless it appears that he is gone abroad for more than a mere temporary absence. *Taylor v. Fraser*, 2 Dowl. 622.

The court refused to compel the plaintiff to give security for costs, upon the ground that he was an uncertificated bankrupt, except upon the undertaking of the defendant not to plead the bankruptcy. *Alexander v. Townley*, 11 Law J., C. P. 322.

*Security for costs where insolvent plaintiff had assigned the debt.]* The court required a plaintiff, who it was alleged was in insolvent circumstances, to give security for costs; where it appeared that he had assigned, amongst other property, the debt for which the action was brought to two of his creditors in trust for the rest. *Perkins v. Adcock*, 3 Dowl. & L. 270; 15 Law J., Ex. 7; 14 Mee. & W. 808.

*Security for costs where plaintiff became bankrupt after new trial granted.]* After verdict in favour of the plaintiff, and a rule for a new trial made absolute, he became bankrupt; the court compelled him to give security for costs, although there was no affidavit that the action was carried on for the benefit of the assignees. *Denton v. Williams*, 8 Dowl. 123.

*Security for costs in a joint action by husband and wife, the former being abroad.]* In an action by husband and wife for a personal

injury to the wife, if the husband be resident abroad, he must give security for costs, although the wife be resident in England.

An allegation, in an affidavit to obtain security for costs, that the plaintiff is residing abroad, is *prima facie* a sufficient statement that he is not abroad for a mere temporary purpose. *Hanmer v. Mangles*, 12 Mee. & W. 313; 1 Dowl. & L. 394.

*Security for costs from prochein amy.]* The fact of the father of an infant plaintiff being insolvent, is not of itself a sufficient ground for refusing his appointment as *prochein amy*, or if appointed before insolvency, of requiring security for costs; but the court on full knowledge of the circumstances, will exercise its discretion. *Duckett v. Satchell*, 1 Dowl. & L. 980, Ex.

*After security found, the amount will not be increased.]* The court refused, in an action of libel, to increase the amount of security, on the ground of the sum ordered (400*l.*) being inadequate to cover the expected expenses of foreign witnesses, &c. *Pizani v. Lawson*, 5 Scott, 418; and *Kent v. Poole*, 7 Dowl. 572.

But where a commission to examine witnesses abroad issued, it was referred to the master whether the amount of the security ought to be increased. *De Rossi v. Polhill*, 7 Scott, 836.

*After security given it cannot be rescinded.]* A surety cannot apply to be relieved, because the plaintiff has returned to England. *Badnall v. Hall*, 4 M. & W. 535; 7 Dowl. 19.

Where security for costs has been given, the defendant will not be entitled to fresh security, if the sureties become insolvent. *Jones v. Jacobs*, 2 Dowl. 442.

*Costs of a second motion not allowed where its object might have been included in the first.]* Where a previous application to set aside a *fi. fa.* on a judgment, on the alleged ground of its having been signed against good faith, had been granted, but it was no part of the application that the judgment should be set aside; and the defendant afterwards, on the same affidavits applied for a rule to stay all further proceedings in the action, the rule was granted, but without costs, as it might have been included in the first motion. *Philpot v. Thompson*, 2 Dowl. & L. 18.

*Costs allowed at chambers.]* A judge at chambers has a discretionary power to allow a plea to be amended, upon payment of a stated sum for costs, instead of costs generally, and the court, where under circumstances only 6*s.* 8*d.* had been allowed, refused to rescind it. *Tomlinson v. Bolland*, 4 Ad. & Ell. N. S. 642; 3 Gale & D. 607.

When an application is made to a judge at chambers to amend the declaration he has the power of determining the amount of costs to be paid as the consideration for making the order. *Collins v. Aaron*, 6 Dowl. 423.

A judge at chambers may award costs as part of his order. *Doe d. Prescott v. Roe*, 9 Bing. 104; 1 Dowl. 274; and *Hughes v. Brand*, 2 Dowl. 131.

It was resolved by all the judges, that a single judge at chambers

has power to give costs upon a summons; but they also at the same time resolved not to exercise this power but in extreme cases. *Bridge v. Wright*, 4 N. & M. 5; 2 Ad. & E. 48.

If a judge at chambers decline giving costs, the court will not entertain an application on the subject; but discharge the motion with costs. *Davy v. Brown*, 1 Bing. N. S. 460; 1 Scott, 384.

*Costs of several issues.]* Where several pleas are pleaded, and one of them, which amounts to an answer to the whole cause of action, is found for the defendant, and others for the plaintiff, the latter is entitled to the costs of the issues found for him, including a portion of the briefs and counsel's fees. *Hazlewood v. Back*, 9 Mee. & W. 1.

But where the costs of an issue found for the defendant will manifestly exceed the costs of the issues found for the plaintiff, the plaintiff is not entitled to retain the postea in his possession; but the court, on the application of the defendant, will order him to re-deliver it to the officer, for the purpose of proceeding to taxation. *Staley v. Long*, 6 Law J., C. P. 191; 3 Bing. N. C. 781; 5 Dowl. 616.

*On discontinuance after new trial granted—costs of former trial.]* Where the defendant had a verdict on one of two issues in a cause, and the plaintiff on the other issue, and the defendant obtained a rule for a new trial on the latter issue, on the ground of misdirection, whereupon the plaintiff discontinued:—Held, that the defendant was not entitled to the costs of the trial. *Earl of Macclesfield v. Bradley*, 7 Mee. & W. 570.

*Execution for costs under an interpleader order.]* A party entitled to costs under an interpleader order is not bound to take out execution under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 7, but may make the order a rule of court, and take out execution under 1 & 2 Vic. c. 110, s. 18. *Cetti v. Bartlett*, 9 Mee. & W. 840.

*Jurisdiction as to costs under Interpleader Act.]* The assignees of a bankrupt, to whom certain goods were consigned, having set up a claim to the goods in the hands of the defendants the carriers, the defendants applied to a judge under the first section of the Interpleader Act, and obtained an order, that unless cause were shown to the contrary on a day named, the assignees should be barred their claim, and pay the defendant's costs. The assignees attended on the day named, and objected to the payment of the costs by them; and the order was discharged. Several summonses were subsequently served, calling on the plaintiffs (the vendors) and the assignees to state the nature and particulars of their respective claims. The assignees did not attend on any of these summonses:—Held, that the judge had no jurisdiction under the act to order the assignees to pay costs. *Grazebrook v. Pickford*, 10 Mee. & W. 279.

*Costs of making a judge's order a rule of court.]* In order to obtain the costs of making a judge's order a rule of court, the proper course is to move for a rule to show cause why the party should not pay the costs of making the order a rule of court and to incorporate it with the rule for making the order a rule of court. *Regina v. Gameson*, 6 Mee. & W. 603; 9 Law J., Ex. 322.

*Setting off costs.]* Interlocutory costs may be set off against final, without reference to the attorney's lien. *Holliday v. Lawes*, 3 Bing. N. S. 776; 5 Dowl. 636.

Where a defendant is taken in execution for the debt and costs recovered in an action, he is entitled to recover interlocutory costs in that action which have not been set off on taxation. *Beard v. McCarthy*, 9 Dowl. 136, B. C.

Costs of the day are the subject of a set-off against the costs of a new trial. *Doe d. Dangerfield v. Allsop*, 9 B. & C. 760.

Costs of a rule may be set-off against the costs of the cause. *Doe v. Carter*, 8 Bing. 330.

Where some issues are found for the plaintiff and others found for the defendant, the costs may be set off against each other. *Newton v. Harland*, 6 Dowl. 644.

The rule Hil. 2 Will. 4, No. 93, which prevents a set-off of costs to defeat the lien of the plaintiff's attorney, does not apply to restrain the master from deducting the costs of the issues found for the defendant from those found for the plaintiff, and allowing the balance only, according to No. 74. *Eades v. Everett*, 4 Law J., Ex. 221; 3 Dowl. 687.

Costs in equity may be set off against costs at law. *Webber v. Nicholas*, 4 Bing. 16.

But not where an attachment has issued. *Wenham v. Fowle*, 2 Dowl. 444, B. C.

Nor in one court, where an attachment has issued in another. *Dicas v. Warne*, 1 Scott, 584.

Costs incurred in the Bankruptcy Court cannot be set off against costs in the Common Pleas. *Woodroffe v. Wootton*, 4 Scott, 364.

Where the plaintiff had been nonsuited, and the defendant's costs had been taxed. On motion on behalf of the plaintiff, for leave to set off these costs against the costs which would be taxed for the plaintiff against the defendant in another case (*Doe d. Masterman v. Malin*), wherin the plaintiff had a verdict, but on which a rule to show cause for a new trial was pending:—Held, that the costs must be taxed before they could be set off. *Masterman v. Malin*, 7 Bing, 435.

Where a plaintiff's rule to enlarge a prior rule was discharged with costs, of which they paid the defendant but a small portion; and the plaintiff's signed judgment in their action against the defendant, for want of a plea, and duly taxed costs, and upon the taxation the defendant alleged his right to set off the costs of the rule against those of the action, but made no formal demand, and finally to avoid execution, paid the entire costs, still alleging his claim, upon an application to deduct the costs of the rule from those of the action:—Held, that the defendant was entitled to deduct so much of the costs of the rule as remained due, and the plaintiffs were bound to pay them, but without costs, inasmuch as both parties were in fault, the plaintiffs in not allowing the deduction, being, as they must have been, aware of the cross demand, and the defendant in not making, as he should have done, a formal claim, and in requiring the payment of an entire sum, when a part had been already allowed. *Abernethy v. Paton*, 5 Bing. N. C. 276; 7 Scott, 122; 8 Law J., C. P. 205.

Where, in an action of trespass, there were several defendants, who pleaded severally, one of whom was found guilty, and the other three had a verdict for them on the several issues:—Held, that the costs of

the defendants who obtained a verdict might be set off against the costs of the plaintiff, which he was entitled to as against the one defendant, who was found guilty, notwithstanding the attorney's lien. *Lee v. Kendall*, 5 Law J., K. B. 19; 5 N. & M. 340.

When a defendant is entitled to costs in respect of a judgment obtained by him, as in case of a nonsuit, and the plaintiff afterwards recovers a verdict, the master may set off the costs of the plaintiff against those of the defendant, without any motion being made to the court for that purpose. *Paxton v. Wyllie*, 10 Law J., C. P. 292.

*Costs of an application to the court which ought to have been at chambers.]* On an application to the court to set aside a declaration for irregularity:—Held, that where the application should have been to a judge at chambers, the court will not give the defendant the costs of the application to the court. *White v. Feltham*, 16 Law J., C. P. 14.

*Costs in opposing writ of habeas corpus ad subjiciendum not allowed.]* Where the court directs a writ of habeas corpus ad subjiciendum to issue, with notice to a party interested in opposing the prisoner's discharge, and the latter is remanded to his former custody, the courts do not allow the costs of the opposition. *In re Cobbett*, 3 Dowl. & L. 79.

*Costs of an abortive trial.]* Where, on the trial of a cause, the jury were unable to agree, and were in consequence discharged by the judge without having given a verdict, and the associate indorsed the record as a remanet; and the cause being tried again, the plaintiff had a verdict:—Held, that he was not entitled to the costs of the first trial. *Brown v. Clarke*, 12 Mee. & W. 25.

*Costs may be taxed on payment of less than is indorsed on writ.]* Where a defendant within four days from the service pays the amount of the debt indorsed on the writ of summons, he is entitled to have the costs taxed, though he pays less than the amount of the costs demanded by the indorsement. *Hunter v. Russell*, 6 Scott N. R. 627.

*Costs of a party appearing on a rule served on him.]* A party upon whom the rule does not call is not obliged to show cause, because he is served with the rule: and if he does, the court will not give him his costs of appearing. *Johuson v. Marriatt*, 2 Dowl. 343.

*Costs on a motion to support a rule or order.]* A party appearing on a rule to support a judicial decision in his favour is not subjected to the payment of costs. *The Queen v. Sheriff of Middlesex in Walker v. Blackwall Railway Company*, 5 Q. B. Rep. 365.

*Costs of the day for not proceeding to trial.]* A rule calling upon the plaintiff to pay the costs of not proceeding to trial, pursuant to notice, is a motion of course, against which the plaintiff cannot show cause. *Alden v. Story*, 12 Law J., Q. B. 6.

In the Exchequer a rule for the costs of the day is a rule nisi, which makes itself absolute, unless cause be shown on or before a certain

day, and cause cannot be shown after that day. *Scott v. Marshall*, 2 Tyrw. 176; 2 C. & J. 60.

This rule cannot be with a stay of proceedings, although two days' notice of the motion be given. *Eager v. Cuthill*, 3 Mee. & W. 60.

Nor will proceedings be stayed until the costs be paid. *Gibbs v. Giles*, 7 Dowl. 325.

Where the issue was joined in July, and notice of trial given for the then ensuing assizes, and the plaintiff did not go to trial, pursuant to this notice, nor yet countermand the notice, the rule to pay costs was, in the Common Pleas, made absolute in the first instance. *Russell v. Hill*, 6 Jur. 106, C. P.

Payment of costs of the day means the same as if the record were withdrawn. *Walker v. Lane*, 3 Dowl. 504, Ex.

On moving for such costs it must be shown costs were incurred. *Ray v. Sharp*, 4 Dowl. 354, Ex.; see *Powell v. James*, p. 81.

Where the plaintiff and the defendant both take the record down for trial, but the plaintiff withdraws his, and it is agreed to make the cause a remanet, neither is entitled to the costs of the day. *Blow v. Wyatt*, 7 Dowl. 86; 4 Mee. & W. 407.

After four terms, previous to moving for costs of the day, a term's notice is not necessary. *French v. Burton*, 2 C. & J. 634.

After the rule for judgment is discharged, a rule may be obtained for the costs. *Thomas v. Williams*, 4 B. & C. 260.

*Costs of the day may be moved for after peremptory undertaking.]* Costs of the day for not proceeding to trial may be moved for after a rule for judgment, as in case of nonsuit, has been discharged on a peremptory undertaking. *Thomas v. Williams*, 4 B. & C. 260; *Hockin v. Reid*, 1 C. & J. 466.

*Costs of the day may be ordered on discharging rule for judgment.]* Costs of the day for not proceeding to trial may be obtained as a separate part of the order for discharging a rule for judgment as in case of a nonsuit, but not as a condition for discharging that rule. *Lenniker v. Barr*, 2 C. & J. 473; 1 Dowl. 563.

A defendant may insist upon an undertaking to pay the costs of the day, if any, when a rule for judgment as in case of a nonsuit is discharged, although he does not show in his affidavit that any costs have been incurred. *Doe v. Owen*, 5 Law J., Ex. 158; and *Doe d. Humpherys v. Owen*, 1 Mee. & W. 322; 1 T. & G. 944.

On a motion for costs of the day for not proceeding to trial on two different occasions, pursuant to notice, the court will not make the payment of those costs a condition precedent to the plaintiff's trying his cause. *Shoredick v. Gilbard*, 8 Dowl. 296.

*A proposal to refer does not disentitle defendant to costs of the day.]* A proposal to refer, made after the commission day:—Held, not to warrant the plaintiff in not proceeding to trial, and that he was liable to pay the costs of the day. *Eaton v. Shuckburgh*, 2 Dowl. 624.

*Costs of the day may be moved for after final judgment.]* Costs of

the day for not proceeding to trial pursuant to notice, may be moved after the signing of final judgment, and taxation of costs by the plaintiff. *Redil v. Lucock*, 2 C. & M. 337 ; 3 Law J., Ex. 16.

*Costs of the day, execution may issue after master's allocatur on rule.]* Where the master, by his allocatur on the back of the rule of court, has allowed to the defendant a sum for the costs of the day upon the plaintiff not proceeding to trial, that sum becomes a sum payable under 1 & 2 Vic. c. 110, s. 18, for which he may issue execution, without any further rule of court directing the plaintiff to pay the money. *Hodgson v. Paterson*, 11 Law J., C. P. 289.

*Costs of the day not allowed when a cause is a remanet.]* Where a cause was at issue, and notice of trial given for the first sittings in term; but by reason of the length of the cause list it was not then tried, and stood for the second sitting, and upon it being called on at the second sitting, the plaintiff withdrew the record; it was held, that the defendant was not entitled to his costs incurred at the first sitting. *Erett v. Stone*, 1 Dowl. & L. 140, Q. B.

*Costs of the day, requisites of affidavit for.]* In an affidavit in support of a rule nisi for costs of the day for not proceeding to trial, it is sufficient to state the joinder of issue, notice of trial, and default of plaintiff, without showing that any costs were incurred by the defendant. *Powell v. James*, 1 Dowl. & L. 415, Ex.

*Costs taxable on reduced scale.]* Where a cause is referred at Nisi Prius, care should be taken to give the arbitrator the same power of certifying that it was a fit cause to be tried before a judge, as the judge at Nisi Prius would have had; otherwise if the award be under 20*l.*, the master must tax on the reduced scale. *Warren v. Smith*, 5 Mee. & W. 159.

Where the defendant, just before the assizes, in order to save the expenses of the trial, agreed to withdraw his plea, and that the plaintiff should be at liberty to sign judgment for 11*l.* 12*s.*, and that on payment of that sum, with costs to be taxed, the proceedings should be stayed:—Held, that the costs must be taxed on the reduced scale. *Cooke v. Hunt*, 5 Mee. & W. 161.

*Plaintiff entitled to higher scale of costs where the cause could not have been tried by a sheriff.]* The plaintiff, in an action for his improper dismissal from the defendant's service, recovered 20*l.* damages. The judge did not certify that the cause was proper to be tried before him. It was admitted that it could not have been tried before the sheriff:—Held, that the plaintiff was entitled to have his costs taxed upon the higher scale. *Walther v. Mess*, 14 Law J., Q. B. 230 ; 2 Dowl. & L. 961.

*Costs of a first trial after an abortive reference.]* Where a cause is referred by order of Nisi Prius, and the award is afterwards set aside on the ground of the arbitrator not having adjudicated on all the matters referred, and the cause is tried again, the party ultimately

succeeding is not entitled to the costs of the first trial. *Wood v. Duncan*, 5 Mee. & W. 87; 7 Dowl. 344.

*Costs occasioned by granting a new writ of inquiry.]* Where the court had set aside a writ of inquiry, and awarded a fresh writ in consequence of the rejection of evidence tendered by the defendant, who, instead of going down to a second assessment of damages, paid the whole amount of the verdict:—Held, that the master was wrong in allowing the plaintiff the costs of that inquiry. *Porter v. Cooper*, 4 Law J., Ex. 192; 2 C. M. & R. 232.

*Costs of a previous trial after judgment on special case.]* Plaintiff obtained a verdict, with leave to the defendant to move for a nonsuit, and the defendant obtained a rule nisi to enter a nonsuit or a verdict for the defendant. On showing cause, the court directed a special case, on which they afterwards gave judgment for the defendant:—Held, that the defendant was entitled to the costs of the trial. *Tobin v. Crawford and others*, 12 Law J., Ex. 77.

*Costs on an application to take money out of court.]* If an application to take money out of court is granted, and the rule is silent as to costs, the successful party is entitled to the costs of the application. *Eyre v. Thorpe*, 6 Dowl. 768.

*A defendant not entitled to costs of appearing on a rule which, if granted, is in his favour.]* Where, the defendant having changed the venue, the plaintiff has brought it back upon the ordinary undertaking, the court will, upon the application of the plaintiff, discharge that rule upon payment of the costs; and if the rule nisi for discharging that rule be drawn up on the terms of paying to the defendant the costs of and occasioned by the rule to change the venue, as well as of the application, the court will not grant the defendant the costs of showing cause. *Robinson and another v. Crewdson*, 15 Law J., C. P. 152.

*Costs on amendment on demurrer.]* After demurrer, when the party has leave to amend upon payment of costs, costs for matters not connected with the demurrer should not be claimed. *Jones v. Roberts*, 2 Dowl. 374, Ex.

If a party pays the costs of an amendment under a judge's order, it is too late afterwards to apply for the costs of the demurrer. *Baden v. Flight*, 5 Scott, 273; 6 Dowl. 177.

*Costs where action arose within the jurisdiction of a local Court of Requests.]* Where the defendant had a verdict upon issue joined, on a plea alleging that the cause of action arose within the jurisdiction of the Westminster Court of Requests:—Held, that it was unnecessary to enter a suggestion upon the roll to deprive the plaintiff of costs. *King v. Walford*, 1 Dowl. & L. 790, C. P.

Affidavits on which a rule is sought to be obtained to enter a suggestion on the roll, to deprive plaintiff of costs, under a Court of Requests Act, need not negative the exceptions to the jurisdiction contained in a proviso of the act. It is sufficient if it appear on the

face of them, that the writ is indorsed for a sum within that which the act prescribes, and if there be a substantive allegation that the sum is one recoverable in the Courts of Requests. *Pomfrey v. Cottrell*, 1 Dowl. & L. 845, C. P.

*Costs of a trial rendered abortive by the misconduct of the jury.]* Where a trial is rendered abortive by the misconduct or failure of the jury, and the cause is tried a second time, the successful party is not entitled to the costs of the first trial. *Brown v. Clarke*, 1 Dow. & L. 409, Ex.; 13 Law J., Ex. 36.

*Costs of an arbitration.]* Costs of an arbitration under an order of Nisi Prius are not costs in the cause. *Taylor v. Lady Gordon*, 9 Bing. 570; 2 M. & Sc. 725.

*Costs to abide the event on a reference—award under 40s.]* Where a cause is referred to arbitration, and the costs are to abide the event, the defendant is entitled to them, if it appear by the award that the plaintiff's demand is under 40s., which might have been recovered in a court of conscience. *Butler v. Grubb*, 3 Doug. 217.

*Costs in trover.]* Where a plaintiff, in an action of trover, succeeds as to part of his claim, and fails as to the rest, he is not entitled to the costs of that part as to which he has failed. *Williams v. The Great Western Railway Company*, 10 Law J., Ex. 472.

*Costs on writ of inquiry after judgment on demurrer.]* A plaintiff, for whom judgment has been given upon demurrer in an action of trespass, and who subsequently obtains one farthing damages only, on a writ of inquiry, is entitled to the costs of the cause without a certificate, notwithstanding the statute 3 & 4 Vic. c. 24, s. 2; as that statute does not apply to judgments upon demurrer, or inquiries consequent upon them. *Taylor v. Rolfe and others*, 13 Law J., Q. B. 39.

*Costs on feigned issue under the Tithe Commutation Act.]* On a feigned issue under the Tithe Commutation Act, the successful party is to be allowed costs, unless he has disentitled himself by misconduct or otherwise. *Earl of Stamford v. Dunbar*, 2 Dow. & L. 852, Ex.

*Costs on trial of issues of fact and judgment on demurrer.]* The plaintiff having obtained judgment on demurrer to a replication, the cause went down to trial upon issues of fact, without a *venire tam quam*. The plaintiff recovered only 20s. damages, and the judge refused to certify under 3 & 4 Vic. c. 24:—Held, that the plaintiff was only entitled to the costs of the demurrer. *Poole v. Grantham*, 2 Dow. & L. 622, C. P.

*Costs of witnesses before an arbitrator.]* The costs of witnesses examined before an arbitrator on a reference of a cause, to prove the issues in the cause, are not costs in the cause, but costs of the reference. *Brown v. Nelson*, 13 Mee. & W. 397.

*Costs in a joint action by husband and wife.]* In a joint action by

husband and wife for libel on the wife, the defendant had judgment, and took out execution for the costs against the husband alone, and subsequently issued a ca. sa. against both:—Held, that the latter was irregular; and the husband having been discharged under the Insolvent Debtors Act, quære, if an audita querela would lie? *Newton v. Rowe*, 7 Man. & G. 329.

*Liability of executors to costs.]* As a general rule, since the statute 3 & 4 Will. 4, c. 42, s. 31, executors, plaintiffs, are liable to costs where they do not succeed; and it is incumbent on them to show some facts which may satisfy the court that they should be exempt in the particular case.

The fact that they were advised by counsel that a point of law, which was ultimately decided against them, was in their favour, or, at all events, that there was sufficient doubt as that the plaintiffs ought to take the opinion of a court of law upon it, is not sufficient. The conduct of the defendant, after action brought, as that there was greater prolixity of pleading than necessary, &c., will not be considered by the court, in exercising their discretion, as to relieving executors from costs. *Farley and others v. Briant and others*, 6 Law J., Q. B. 87.

Executors who are plaintiffs will not be exempted from paying the costs of issues on which they have failed, unless the defendant has been guilty of deception or misrepresentation. It is not enough that the conduct of the defendant has been such as to induce the executors to go on. *Birkhead and another, executors, v. North*, 16 Law J., Q. B., 284.

*Costs of an action on a judgment—application for.]* The application under the statute 43 Geo. 3, c. 46, s. 4, for an order to entitle a plaintiff to costs in an action on a judgment, must be made either to the court or a judge at chambers, and not to a judge at Nisi Prius. *Jones v. Lake*, 8 Car. & P. 395—Parke, B.

*Costs of an action not payable by a party not on the record.]* The Court of Exchequer will not interfere to make a person who is not a party to the record pay the costs of the action, though he is the real party interested in the event of it. *Hayward v. Gifford*, 4 Mee. & W. 194.

*Costs of action not payable by the party interested in the suit, unless a party on the record.]* The court will not interfere to make a person who is not a party to the record pay the costs of an action (except in case of an ejectment) although it appear that he was the party really interested, and that he, in fact, carried on the action. *Evans v. Rees—Rees, administratrix, v. Evans*, 11 Law J., Q. B. 11.

*A rule to pay the costs ordered by a former rule, and on the master's allocatur, is unnecessary.]* The defendants had obtained a rule for costs of the day, for not proceeding to trial, on which the master had indorsed his allocatur. The court discharged a subsequent rule nisi, calling on the plaintiff to pay the amount so taxed. *Wright v. Burroughs and others*, 2 Dowl. & L. 94, Q. B.

*Payment of costs by prochein amy.]* To make absolute a rule for payment of costs against a prochein amy, under the 1 & 2 Vic. c. 110, s. 18, the same proceedings are requisite as in case of an attachment for non-payment of costs.

An insufficient service is not cured by the prochein amy appearing and showing cause against the rule. *Abrahams, by his next friend, v. Taunton*, 1 Dowl. & L. 319, Ex.

*Costs of issues on traverse of return to mandamus.]* The traverser of a return to a writ of mandamus is not entitled to the costs of issues taken on the return, and found for him at the trial, unless he succeeds on the whole. *The Queen on prosecution of Emery v. The Mayor, &c. of Malmesbury*, 11 Law J., Q. B. 318.

*Costs of detention of a material witness where the trial is put off by the other side.]* Where a trial has been postponed at the instance of a defendant, a plaintiff, who succeeds in the action, is entitled to the costs of detaining a material witness, a captain of a vessel, for 300 days; and is not bound to examine him on interrogatories. *Evans v. Watson and another*, 15 Law J., C. P., 256.

*Costs of a remanet, the defendant having obtained a verdict on an amended plea.]* To an action of trespass the defendants pleaded four pleas, of which the third was bad. The cause stood for trial at the summer assizes, 1844, and was made a remanet. Before the next assizes the defendant amended, by substituting another plea in the room of the third, and paid the costs of the amendment. The cause was tried at those assizes, when a verdict was returned for the defendants on the substituted plea, and for the plaintiff on the three others:—Held, that the defendants were entitled to the general costs of the cause, but that the plaintiff was entitled to the costs of the remanet. *Waller v. Blacklock and others*, 15 Law J., Ex. 333.

*Costs of a special jury.]* On a motion for the costs of a special jury, the court held, that neither party is entitled to the costs of a special jury, where one issue is found for the plaintiff and the other for the defendant. *Morison v. Harmer*, 5 Scott, 411.

*Costs—feme covert.]* On a plea in bar, by a married woman, of her coverture, and a verdict in her favour thereupon, she is entitled to costs. *Findley v. Furquharson*, 15 Law J., C. P. 262.

*Costs on judgment non obstante veredicto.]* On motion for judgment non obstante veredicto:—The court held, when imaterial issues are found for the defendant, but judgment afterwards entered for the plaintiff non obstante veredicto, neither was entitled to the costs of those issues. *Goodburne v. Bowman*, 9 Bing. 667; 3 M. & Sc. 65; 2 Dowl. 206.

*Costs of opposing a rule afterwards reversed on error.]* A rule having been obtained for judgment on a plea, non obstante veredicto,

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afterwards reversed on error:—Held, that the defendant was entitled to the costs of opposing the rule. *Evans v. Collins*, 2 Dowl. & L. 989, C. P.

*Costs of issues on which the jury is discharged.]* Though the defendant succeeds on a plea which goes to the whole declaration, he is not entitled to the costs of any issues on which the jury have been discharged. *Valance v. Evans*, 1 C. & M. 856; 2 Law J., Ex. 272.

## DECLARATION.

*Commencement of declaration.]* Under rule 15, Reg. Gen. M. T. 3 Will. 4, the declaration, in its commencement, should state whether it is delivered or filed by the plaintiff in person, or by his attorney; a declaration omitting this is irregular and may be set aside, notwithstanding the notice of declaration served states it to have been served by an attorney. But held, that the proper course in such a case is to apply to a judge at chambers, and that the court will not give the defendant the costs of the application to the court, though the declaration be delivered or filed in term. *White v. Feltham*, 16 Law J., C. P. 14.

*Declaration on bill of exchange—description of parties by initials.]* In a declaration on a bill of exchange, it is informal to describe any of the parties to the bill by the initials only of his Christian name, without showing that he is so described in the bill itself. *Esdaile v. Maclean*, 15 Mee. & W. 277.

*Declaration—description of plaintiff as public officer of a company.]* A declaration, describing the plaintiff as “one of the present public officers of certain persons united in co-partnership for the purpose of carrying on the trade and business of banking in England, according to the statute” (7 Geo. 4, c. 46), is bad on special demurrer, for not stating that the co-partnership was carrying on the trade and business of bankers. *Fletcher P. O. v. Crosbie and others*, 11 Law J., Ex. 16.

*Entitling of declaration.]* It is irregular to entitle a declaration of the court on the back of it only. *Rippling v. Watts*, 4 Dowl. 290.

*Time for declaring.]* Whether an appearance is entered in term time, or during the vacation, the plaintiff has the whole of the term next after to declare in. Therefore where an appearance was entered in Easter term, and judgment of non pros. was signed in Trinity term, the court set aside the judgment as irregular. *Foster v. Prime*, 10 Law J., Ex. 418; 8 Mee. & W. 664.

After appearance by the defendant, the plaintiff may declare without waiting the eight days. *Morris v. Smith*, 2 C. M. & R. 314; 4 Dowl. 198.

It is not too late on the 25th to take advantage of an irregularity in declaring too soon, which has occurred on the 7th. *Fish v. Palmer*, 2 Dowl. 460.

If a plaintiff's proceedings on a writ of summons are stayed by rule, he is bound to declare within a year after the expiration of that rule, or he will be out of court. *Unite v. Humphrey*, 3 Dowl. 532.

*Declaration against one of two defendants.]* Where the writ of summons was against two, the declaration against one held regular. *Caldwell v. Blake*, 2 C. M. & R. 249; 4 Law J., Ex. 200; and *Bowles v. Bilton*, 2 C. & J. 474.

Where the affidavit of debt was against two and the declaration against one, it was held irregular; and after a summons taken out for setting it aside, and referred to the court:—Held, that the plaintiff could only withdraw it upon payment of costs. *Bellotti v. Barella*, 4 Dowl. 719, Ex.

In tort, on bailable process against two, the plaintiff may declare against one. *Wilson v. Edwards*, 3 B. & C. 734; 5 Dowl. 622.

Where a plaintiff sues out a *cupias* against two and he arrests one only, he cannot declare against him alone. *Carson v. Dowling*, 4 Dowl. 297; and *Woodcock v. Kilby*, 1 Mee. & W. 41.

*Declaring separately against two defendants.]* Where the original writ was against two, and the plaintiff declares against them separately, the court would not set aside the proceedings. *Durrant v. Scrobold*, 3 Doug. 400.

On a writ against two and only one defendant served, time to declare must be obtained the same as if one defendant only. *Morton v. Grey*, 9 B. & C. 544.

*Declaration in trespass—statement of abutments.]* In trespass qu. cl. fr., a description of a close by two abutments only is a sufficient compliance with the rule of H. T. 4 Will. 4, Trespass, 1. *North v. Ingamells*, 9 Mee. & W. 249.

*Striking out of the declaration the sum paid into court in lieu of bail.]* On a deposit in lieu of bail, under 7 & 8 Geo. 4, the defendant may apply that that sum be struck out of the declaration. *Hubbard v. Wilkinson*, 8 B. & C. 496.

*Service of declaration on defendant instead of his attorney irregular.]* Where the defendant's attorney regularly entered an appearance for him in a cause, of which the plaintiff took no notice, but proceeded to enter an appearance for the defendant, and notice of declaration was on the 17th of December personally served upon the defendant in the country, of which the defendant's attorney had no notice or knowledge:—Held, an irregularity only, and not a nullity. *Alsager v. Crisp*, 10 Law J., Q. B. 130.

*Service of notice of declaration on one of two joint defendants.]* Service of a notice of declaration on one of two joint defendants, who are partners, at the partnership place of business, is not a sufficient service on the other. Quære, whether the service would be sufficient, if it appeared that the subject-matter of the declaration related to a partnership debt. *Moulston v. Wire and another*, 1 Dowl & L. 527, C. P.

*Notice of declaration—rule to plead.]* A rule to plead before declaration is irregular, but the irregularity is waived by the defendant taking out a summons for time to plead. *Pope v. Mann*, 2 Mee. & W. 881.

But a rule to plead may be entered before notice of declaration, if on the same day. *Aitman v. Conway*, 6 Dowl. 76; 3 Mee. & W. 71.

*Demand of declaration.]* Only one demand of declaration is necessary; and therefore, if the plaintiff obtains further time to declare, the defendant will be entitled to sign a non pros. at the expiration of the last order for time. *Teulon v. Gant*, 5 Dowl. 153.

*Notice of declaration—defendant in custody.]* In an action, commenced by writ of summons, a writ was taken out under 1 & 2 Vic. c. 110, s. 3, and the defendant arrested under it. The plaintiff subsequently entered an appearance for the defendant, and filed a declaration with the masters, and served the defendant with notice of the declaration:—Held, that this was regular, and that it was not necessary to serve the defendant with the copy of the declaration. *Neale v. Snowden*, 15 Law J., C. P. 22; 3 Dowl. & L. 422; 2 C. B. 322.

*Setting aside notice of declaration.]* The writ being on promises and the declaration in debt, the defendant obtained a rule to show cause why the notice of declaration should not be set aside; on showing cause it was objected that the rule should have been to set aside the declaration:—Held, that the defendant could only move to correct what he knew to be wrong, that if he had taken the declaration out of the office he would have waived the irregularity. The rule was therefore made absolute. *Parker v. Perry*, MS. Exch., E. T. 1846.

In order to set aside a declaration filed, by reason of the non-service of process, the defendant must deny, not only the actual service, but that the process has come either to his hands or his knowledge. And for the purpose of satisfying the court, according to R. 33, H.T. 2 Will. 4, that he makes the application within a reasonable time, it is incumbent on him to state when he first knew of the notice of declaration. *Cecily v. Bennison*, 2 Law J., Ex. 3.

*Waiver of irregularity in notice of declaration by taking same out of office.]* Where the writ of summons was upon promises, and the notice of declaration in debt, the court refused to set aside the notice of declaration for irregularity, after the defendant had taken the declaration which was upon promises out of the office. *Heywood v. Fayrer*, 11 Law J., Q. B. 52.

A variance between the description of the form of action stated in the notice of declaration, and in the declaration itself, is an irregularity, but it is waived by the defendant taking the declaration out of the office. *Robins v. Richards*, 1 Dowl. 378.

And where a plaintiff had declared conditionally after the time for the defendant's appearing had expired, and the defendant took the declaration out of the office:—Held, a waiver of the irregularity. *Gilbert v. Kirkland*, 1 Dowl. 153.

*An irregular declaration should be objected to before plea.]* A bailable writ was sued out against three; all were arrested, but one being an administratrix obtained her discharge. Plaintiff then declared against the other two:—Held, that after pleading, they could not set aside the declaration for irregularity. *Bartrum v. Williams*, 4 Bing. N. C. 301; 6 Dowl. 397.

*Notice of declaration.]* The notice of declaration must agree with the writ of summons. *King v. Skiffington*, 1 Dowl. 686; 1 C. & M. 363.

If the notice vary from the writ the motion may be to set aside the declaration. *Robinson v. Errington*, 9 Dowl. 107, B. C.

*Notice of declaration where the defendant cannot be found.]* If the defendant's residence be unknown, the rule for affixing the notice in the office is absolute in the first instance. *Bridger v. Austin*, 1 Dowl. 272; 1 M. & Sc. 520.

But some attempt must have been made to find the defendant. *Fry v. Rogers*, 2 Dowl. 412, B. C.

The mere fact of his being an itinerant performer, and address unknown, is no ground for sticking up the declaration in the office. *Kemp v. Powell*, 8 Moore, 273.

When the court allow notice of the declaration to be stuck up in the master's office, they will not, on the same rule, direct the service of all future notices and rules to be made in the same way. *Layton v. Mason*, 6 Dowl. 275.

*Declaring against a defendant in custody on a writ of capias.]* The rule of T. T. 3 Will. 4, R. 1, does not apply to the case of a defendant in custody by virtue of a writ of capias issued under 1 & 2 Vic. c. 110, s. 3. *Ireland v. Berry*, 1 Dowl. & L. 866, Q. B.; and *Turner v. Parker*, 2 Dowl. & L. 444, Ex.

*Date of writ in declaration.]* A declaration will not be set aside on the ground of the date of the writ being omitted at its commencement; the Rule H. T. 4 Will. 4, is only applicable to the issue, not the declaration. *Du Pré v. Langridge*, 2 Dowl. 584, B. C.

*Application to strike out counts in a declaration.]* A declaration contained twenty-five counts. The first fifteen were on bills of exchange drawn in Paris. The next five, which related to the same bills, were special counts founded on the law of France; and the last five were on a special agreement to pay the bills in consideration of the plaintiff procuring their discount. Application having been made to strike out the last set of counts:—Held, that they were not in apparent violation of Reg. Gen. H. T. 4 Will. 4 r. 5. *Gilbert v. Hales*, 2 Dowl. & L. 227, Ex.

*Striking counts out of declaration.]* Applications to strike out counts from the declaration should be made in the first instance at chambers. *Ward v. Graystock*, 4 Dowl. 717, Ex.

Unless they involve a point of law or construction of a statute,

when the motion should be made to the court. *Doe d. Overseers of Ilandesillo v. Roe*, 4 Dowl. 222, Ex.

The defendant, on the 6th of November, obtained a judge's order for a week's time to plead; on the 12th he took out a summons to strike out one of two counts in the declaration, which, on the 14th, was dismissed with costs, and at the same time an order was made giving him three days' time to plead. On the 19th he obtained a rule for striking out the first or second count:—Held, that the application was too late, and that the rule must be discharged. *Chapman v. King and another*, 16 Law J., Ex. 15.

*Amendment of declaration by substituting one count for another.]* After issue joined, and a peremptory undertaking given, the declaration may be amended by the substitution of one count for another. *Storr v. Watson*, 2 Scott, 842, C. P.

But the court will not allow an amendment to change the entire form of action, as trover, into an action of debt and detinue. *Green v. Milton*, 4 B. & A. 369; 1 N. & M. 673.

*Amendment of declaration by adding a count.]* A new count may be added when its introduction is to raise the real question between the parties. *Dale v. Gordon*, 3 M. & Sc. 339, C. P.

Where the plaintiff contracted with the defendants to build a steam engine for pumping defendant's colliery, to be completed and fixed for 2,500*l.*; the engine was forwarded in parts, and fixed piecemeal at the colliery:—Held, that the price could not be recovered under a count “for the price and value of an engine, and other goods sold and delivered,” but that the proper form of count was for work, labour, and materials, or for erecting and constructing an engine. Semble, that the judge at the trial might have amended the record, by inserting such a count. *Clarke and others v. Bulmer and others*, 1 Dowl. & L. 367.

Under particular circumstances the court will, even after argument on a rule for entering a nonsuit, and after judgment pronounced, grant leave to amend the declaration on payment of costs. *Laythorp v. Bryant*, 1 Scott, 338.

In an action for the disturbance of a right of ferry, the declaration was allowed to be amended, after the cause had been taken down to the assizes, and the record withdrawn, by introducing new counts in which the termini of the ferry were varied, and also the description of the person liable to toll. *Morris v. Evans*, 1 Dowl. 657.

*Amendment of declaration.]* In an action by the assignees of a bankrupt the declaration may be amended, by the insertion of the name of the official assignee as a plaintiff, unless the defendant can make an affidavit that he has defended the action solely by reason of the non-joinder of such assignee. *Baker v. Neave*, 2 Law J., Ex. 40; 1 C. & M. 112; 3 Tyrw. 233.

The court have power under 3 & 4 Will. 4, c. 42, to amend in all cases where the party could not have been misled by the mistake, although even by such amendment a new and distinct contract may be substituted for the one declared on. Thus, it was held, that where

the declaration was on a promise to pay, and the evidence was to guarantee payment, the judge was justified in amending the declaration by substituting the word guarantee for pay. *Hanbury v. Ella*, 1 Ad. & E. 61; 3 Law J., K. B. 147; 3 N. & M. 438.

In general, the judge at Nisi Prius will amend any variance which does not go at all to affect the matter really in dispute between the parties, and which was not likely to mislead the opposite party. Therefore, where a general warranty of the soundness of a horse was declared on, and a warranty, "except in one foot," was proved, the judge allowed the declaration to be amended, the real dispute between the parties being whether the horse was a roarer. *Hemming v. Parry*, 6 C. & P. 580; Alderson, B.

*Declaration amended to accord with particulars delivered.]* A declaration in debt for goods sold, work and labour, and on an account stated, alleged a debt of 100*l.* on each count. The particulars were for 168*l.* for goods sold. Application being made to the judge before the cause was called on, at the trial he ordered each count to be amended by inserting 200*l.* instead of 100*l.* *Dew v. Katz*, 8 C. & P. 315.

*Variance in notice of declaration and particulars with the writ.]* A variance between the writ and the particulars delivered with the notice of declaration, is no ground for setting it aside. *Davis v. Jones*, 1 C. M. & R. 582; 5 Tyrw. 182; 4 Law J., Ex. 2.

*Variance in declaration and writ in the form of action.]* An objection that the form of action stated in the declaration varies from that mentioned in the writ of summons is not waived by the defendant's taking the declaration out of the office. *Driver v. Harrison*, 1 Dowl. & L. 72, C. P.

The writ of summons is now the commencement of an action, and, therefore, if the form of action declared upon is different from the form specified in the writ, the declaration is irregular. *Thompson v. Dicas*, 2 Law J., Ex. 294; 1 C. & M. 768; 3 Tyrw. 873.

*Variance in declaration and writ of a Christian name.]* Where the Christian name in the declaration varied from that in the summons:— Held, that the objection must be taken within the time for pleading, and that, after judgment signed for want of a plea, it was too late to move to set it aside for such irregularity. *Kitchin v. Brooks*, 5 Mee. & W. 522.

If the initials only be used in the writ and declaration, the application should be to amend the declaration. *Rush v. Kennedy*, 4 Mee. & W. 586; 7 Dowl. 199.

Where a plaintiff has sued a defendant by his wrong Christian name, but has declared against him by his right Christian name, the proceeding is regular since the 3 & 4 Will. 4, c. 42, s. 11. *Hobson v. Wadsworth*, 8 Dowl. 601.

*Declaration in action on a judgment—style of Court of Common Pleas.]* The declaration on a judgment stated it to have been obtained in the court of our lady the queen of her bench here at Westminster,

to which the defendant pleaded, "That there was not any record of the said supposed recovery remaining in the said court of our lady the queen, before the queen herself at Westminster, named in the said declaration in the court of our lady the queen of her bench at Westminster, in manner and form as in the declaration alleged;" to which the plaintiff replied, that there is such a record of the said recovery remaining in the said court of our lady the queen of her bench here, in manner and form as in the declaration alleged. Upon motion for judgment, upon production of a record of this court:—Held, that the description in the declaration was a sufficient description of this court, and that a sufficient issue was joined by the plea, and that the plaintiff was entitled to judgment. *Bradley v. Grey*, 16 Law J., C. P. 26.

*Indorsement of time to plead on declaration not necessary.]* Where a declaration is filed, an indorsement of time to plead is unnecessary, a notice of such time being contained in the notice given of the declaration being filed. *Silverside v. Tappen*, 9 Law J., C. P. 176.

*Amendment of declaration to save the statute of limitations.]* A declaration may be amended where the defendant is described as administratrix, but the administration is not taken out until after action brought, where the statute of limitations would be a bar. *Taylor v. Lyon*, 2 M. & P. 586.

*Insertion of venue in the declaration.]* The improper insertion of venue in the declaration, contrary to the new rules, is not an irregularity, for which the declaration can be set aside; the course is to apply to a judge at chambers to strike it out. *Townsend v. Gurney*, 1 C. M. & R. 590; 5 Tyrw. 214.

### DEMURRER.

*A demurrer must be properly entitled with the date.]* The demurrer should describe the year to be "in the year of our Lord." *Holland v. Tealdi*, 8 Dowl. 320, B. C.

*Delivery of demurrer books.]* It was objected that the defendant could not be heard until he had paid for his paper-books, which had been delivered for him by the plaintiff under the practice rule of H. T. 4 Will. 4, s. 7; it appeared that the demurrer standing for argument on Monday the 20th of January, the plaintiff delivered his paper-books on Tuesday the 14th, the defendant not having delivered his paper-books, the plaintiff on the following morning delivered them for him; but, at a later hour on that day, the defendant delivered his own paper-books:—Held, that according to the practice in this court (Exchequer) the defendant had delivered his paper-books in time. *Hodgins v. Hancock, executor, &c.*, 14 Mee. & W. 120; 2 Dowl. & L. 894.

A discrepancy existing in the practice of the different courts in this respect the following rule was afterwards promulgated by the judges, dated 12th of June, 1845:—"We think that Sunday ought to be counted as one of four days between the delivery of paper-books, and the day of argument, except it is the last, when it is to be omitted,

according to the general rule." 14 Mee. & W. 335; 3 Dowl. & L. 243; 1 C. B. 871.

Judgment cannot be moved for until demurrer books are delivered on both sides. *Commelin v. Thompson*, 1 C. & J. 461; 2 Tyrw. 346.

Unless the four books are delivered the demurrer will be struck out. Where one party has delivered all the books he is entitled to judgment; but where he has only delivered his own, and the other party has not delivered any, the case must be struck out. *Abraham v. Cook*, 3 Dowl. 215, Ex.

*Consequence of non-delivery of demurrer books.]* Where the plaintiff, upon the defendant's default, delivers copies of the demurrer books to the judges, he is entitled to judgment, unless the defendant appears and pays for his half of the paper-books. *Wilton v. Scarlett*, 1 Dowl. & L. 810, C. P.

*Costs of demurrer books delivered by one party for the other.]* On demurrer it was alleged by affidavit, that a party had made default in delivering a demurrer book in time; and it appeared that both parties had delivered demurrer books to the same judges. In order to entitle one party to insist on the costs being paid or deposited with the clerk of the rules, before the adverse party could be heard, pursuant to Rule 14, H. T. 4 Will. 4:—The court held, that with respect to costs, the adverse party must have notice and an opportunity of answering the affidavit; but it was no ground for refusing to hear the argument. *Sandell v. Bennett*, 4 N. & M. 89; 1 Ad. & E. 204.

Qr.—The above-mentioned rule refers to proceedings in error not to demurrs. In the Exchequer notice is not required to entitle a party to costs if he has actually delivered the books for the party making default.

To entitle a party to the costs of delivering copies of the demurrer books, in default by the other party, he is bound to deliver them on the day following that on which the party making default ought to have done so. *Fisher v. Snow*, 3 Dowl. 27, B. C.

*Demurrer irregular if no point be stated in the margin.]* A demurrer delivered without any marginal note, although the demurrer stated the cause of demurrer, the court set it aside as irregular. *Lindus v. Pound*, 2 Mee. & W. 240; 5 Dowl. 459.

But it is no objection to the demurrer being argued. The effect of the rule is, that such a demurrer may be set aside as irregular. *Lacey v. Umbers*, 3 Dowl. 732, Ex.

*Points of demurrer in the margin.]* It is sufficient in the margin to state that the causes are stated in the demurrer. *Berridge v. Priestly*, 5 Dowl. 306, Ex.; *Whitmore v. Nicholls*, 5 Dowl. 521, B. C.

*Points of demurrer to be set forth in the margin.]* A demurrer being called on in the Queen's Bench, where no points for argument were stated in the margin, but only a general reference to the causes assigned in the body of the demurrer, the court would not hear the case argued: it was ordered to be struck out with costs to be paid by the

party demurring. *Peake v. Screech*, T. T. 1845, and in the Exchequer. *Rylatt v. Marfleet*, T. T. 1845. The court directed that in future the real grounds of demurrer intended to be relied on should be stated as points in the margin, and that the authorities intended to be relied on should be also stated.

*Points not marked in the demurrer book—consequence thereof.]* Where the points, on which a party meant to rely, were not marked in the demurrer books, nor notice left at the chambers of the lord chief justice, according to the rule of Trinity term, 11 Geo. 4, the court ordered the argument to be postponed until the next special paper day, the offending party to pay the costs of the postponement, if any should be incurred. *Gould v. Oliver*, 6 Law J., C. P. 290.

Where there is a demurrer to a pleading, and the party joining in demurrer does not state in the margin of his demurrer book any objection to a former pleading:—Semble, that he is not entitled to object to its sufficiency on the argument; especially where it is only cause of special demurrer. *Parker v. Riley*, 3 Mee. & W. 230.

*Point in the margin referring to the plea not sufficient.]* Where the ground of demurrer stated in the margin was, that the matter stated in the plea contained no answer to the declaration, is not sufficient. *Ross v. Robeson*, 3 Dowl. 799, Ex.

*Demurrer for duplicity.]* The court refused to hear a demurrer for duplicity argued where the demurrer did not point out in what the duplicity consisted. *Smith v. Clench*, 2 Ad. & E., N. S. 835.

*Pleadings at length in demurrer books not allowed.]* The court held that demurrer books ought not to have the pleadings set forth at length, and that the master ought not to allow the costs of the same on taxation. *Williams and Wife v. Waters, executor*, MS. Exch., E. T. 1845.

By rule H. T. 1828, in all the courts, it is ordered, that from and after the end of this present Hilary term, when there shall be a demurrer to part only of the declaration or other subsequent pleadings, those parts only of the pleadings to which such demurrer relates shall be copied into the demurrer books; and if any other parts shall be copied therein the prothonotary shall not allow the costs thereof on taxation, either as between party and party, or attorney and client, 7 B. & C. 642; 4 Bing. 549; 2 Y. & J. 430.

*Amendment after demurrer.]* After leave given to the defendant to amend on demurrer, and each party pleads de novo, the defendant may under circumstances again amend. *Jones v. Roberts*, 2 Dowl. 698, Ex.

*Time of demurring, Easter intervening.]* A demurrer is within the rule regulating the Easter vacation. *Harrison v. Heathom*, 4 Bing. N. S., 443.

*On demurrer to pleas separately pleaded, separate counsel not heard.]* Where defendants plead separately pleas which are demurred to, each

defendant is not entitled to appear by separate counsel on the argument of the demurrer. *Willson v. Carey and another*, 12 Law J., Ex. 17.

*A joinder in demurrer must be demanded.]* A party cannot add the joinder in demurrer, it must be demanded from the other side. *Billing v. Kightley*, 5 Bing. N. S., 629; 7 Scott, 844; and *Mullins v. Cox*, 7 Dowl. 660, C. P.

The terms of rejoining gratis do not extend to a joinder in demurrer. *Jones v. Key*, 2 C. & M. 340; 2 Dowl. 265; and *Cooke v. Blake*, 16 Law J., Ex. 151.

*Frivolous demurrs.*] A special demurrer, although frivolous, is not necessarily a nullity. *Nanney v. Kenrick*, 1 Dowl. 609, Ex.

Where a demurrer is not absolutely frivolous, but evidently for the purpose of gaining time, the court will order it to be placed at the head of the paper. *Dawson v. Parry*, 6 Scott, 890.

Where the demurrer is clearly frivolous, the court will order it to be set aside unless cause be shown by a certain day. *Kinnear v. Keane*, 3 Dowl. 154, Ex.

It is too late to set aside a demurrer as frivolous after notice of trial given on issues in fact. *Norton v. Mackintosh*, 7 Dowl. 529, B. C.

A rule for setting aside a frivolous demurrer must be drawn up on reading the pleadings. *Howorth v. Hubbersty*, 3 Dowl. 455, Ex.; 5 Tyrw. 391; and *Hamer v. Anderton*, 9 Dowl. 119, B. C.

A demurrer will not be set aside as frivolous, under the rule of H. T. 4 Will. 4, s. 2, unless it appear clearly to the court that the demurrer is obviously frivolous, and that a bona fide arguable point has not been raised by it. *Naters v. Sutton*, 10 Jur. 617, B. C.

The court will not set aside as frivolous a demurrer to the replication de injuriâ, where the effect of the plea is doubtful, and the point fairly admits of argument. *Dalton and another v. M'Intyre*, 10 Law J., Ex. 342.

A demurrer will not be set aside as frivolous where there are conflicting decisions as to the validity of a point raised by the demurrer. *Langdale v. Maclean*, 10 Jur. 642, Q. B.

Defendant demurred to a count on a bill of exchange, on the ground that the initials only of the christian name of one of the parties to the bill were set out in the declaration, without any allegation therein that the party was so designated in the bill. A rule nisi was obtained to set aside this demurrer as frivolous. The court discharged the rule, but without costs. *Ib.*

In subsequent cases, the courts have determined that the omission is a valid ground of demurrer. *Esdaile v. Maclean*, 15 Mee. & W. 277; and *Levy v. Webb*, 15 Law J., Q. B. 407; 10 Jur. 980.

A demurrer for using the term "month" instead of "calendar month" in a plea to an action on an attorney's bill under 6 & 7 Vic. c. 73, will not be set aside as frivolous. *Parker v. Gill*, 10 Jur. 1096, B. C.—Patteson, J.

Declaration in case for a conspiracy to defraud plaintiff, by inducing him to believe that defendant F. was about to sell by auction wine which was the property of S., contained allegations that defendants

caused to be published advertisements of the sale, and that by divers advertisements they published that there would be sold at the said auction 200 dozen of choice old wines, and that the same had been part of the property of S., and that the sale was by order of the executors of S.

Defendant S. pleaded not guilty, and three other pleas traversing the above allegations. Plaintiff demurred to the three pleas.

Defendants, after obtaining time to join in demurrer, obtained a judge's order for setting aside the demurrer as frivolous, or striking out of the declaration the averments denied by the pleas. Upon motion to discharge this order:—Held, first, that a plaintiff is within the Reg. Gen. H. 4 Will. 4, by which a demurrer may be set aside as frivolous, the word "plea" employed in that rule means "pleading" and applies to any pleading by either party.

Secondly, that a frivolous demurrer is not an irregularity which can be waived, but an improper proceeding, which may be set aside at any time in the discretion of the court.

Thirdly, that the order was right. *Cutts v. Surridge and others*, 11 Jur. 585.

*A demurrer will not be struck out on account of bankruptcy.]* The court refused, at the instance of the plaintiff, to allow a demurrer to be struck out of the paper, on the ground that, since it had been set down, the defendant had become bankrupt, and his assignees refused to take up the defence, or to give security for costs. *Flight v. Glossop*, 2 Scott, 224.

*After judgment on demurrer an amendment has been allowed.]* An amendment has been permitted after judgment on demurrer on an affidavit of the discovery of material facts. *Atkinson v. Bayntun*, 1 Bing. N. S. 740; 1 Scott. 424, C. P.

And where on affidavit merits are distinctly shown. *Braham v. Roberts*, 1 Scott, 364.

But new pleas will not be allowed to be added after the plaintiff has obtained judgment on demurrer to pleas already pleaded. *Manning v. Lennox*, 12 Moore, 133.

*Issues of law answering the whole action, with issues of fact undisposed of.]* Where upon demurrer there has been judgment for the defendant upon pleas going to the whole cause of action, and issues of fact are also upon the record (which have not been tried), the court will not compel the defendant to enter up judgment of nil capit per breve, so as to enable the plaintiff to go to a court of error before trying the issues in fact. *Hinton v. Aeraman*, 16 Law J., C. P. 2.

*Option of the plaintiff to try issues in law or issues in fact.]* The plaintiff has the option, subject to the discretion of the court, of determining whether the issues in law in an action shall be decided before the issues in fact. It seems more convenient to determine the issues in law first, on the ground, that after verdict no amendment can be made on demurrer, and also that a trial may become unnecessary. *Crucknell v. Trueman and another*, 12 Law J., Ex. 31; 9 Mee. & W. 684.

*Issues of fact may be tried pending issues of law on demurrer.]* The court will not direct issues of law to be argued before the issues of fact on the same record are tried, unless there be manifest inconvenience, or the merits will be disposed of on demurrer. *Roberts v. Taylor*, 8 Sc. N. S. 399; 7 Man. & G. 659.

*Demurrers by plaintiff and by defendant, right to begin.]* Where the defendant demurs to one count of a declaration, and the plaintiff demurs to a plea to the other counts, the plaintiff, on the argument of the demurrs, is entitled to begin. *Williams v. Jurman*, 13 Mee. & W. 128; 2 Dowl. & L. 212.

In the court of Queen's Bench it has been held, that the party who first demurs is entitled to be heard first upon the argument. *Hilton v. Earl Granville*, 13 Law J., Q. B. 193.

*Demurrer argued and judgment thereon after the death of plaintiff.]* Where the plaintiff died after a demurrer had been set down in the special paper, but before the demurrer came on for argument, judgment having been subsequently given for him on the demurrer, the court made absolute a rule to enter up judgment as of the term in which the demurrer was set down for argument. *Miles v. Bough*, 3 Dowl. & L. 105, B. C.—*Wightman, J.*; and *Miles v. Williams*, 11 Jur. 36.

## DISCONTINUANCE.

*A rule to discontinue is no stay of proceedings.]* A rule to discontinue on payment of costs under the Reg. Gen. H. 2 Will. 4, R. 106, with notice of an appointment to tax the costs, is no stay of proceedings; and consequently a rule for judgment, as in case of a nonsuit, for not proceeding to trial after a peremptory undertaking, obtained after such a rule and notice, is regular. *Beeton v. Jupp*, 15 M. & W. 149; 10 Jur. 646, Ex.; 3 Dowl. & L. 474.

*A plaintiff cannot discontinue pending a rule staying proceedings.]* A rule to discontinue is such a proceeding in a cause as to be a violation of a rule drawn up by the defendant with a stay of proceedings. *Murray v. Silver*, 14 Law J., C. P. 236.

*Discontinuance must be before verdict.]* It is too late to discontinue after verdict for the defendant, with leave for the plaintiff to move to enter a verdict for himself. *Goodenough v. Butler*, 3 Dowl. 751, Ex.

In ordinary cases the court will not grant leave to a plaintiff to discontinue where a verdict has been found against him and is not special. Assuming that, under peculiar circumstances, the court would grant such leave, they will not do so if there has been a delay not sufficiently accounted for. As where a verdict for plaintiff was set aside on motion in Hilary term, and the verdict entered for the defendant, and the plaintiff moved in Trinity term to discontinue, without any explanatory affidavit. *Young v. Hickens*, 6 Q. B. 606.

*Discontinuance after special verdict.]* The court will not allow the

plaintiff to discontinue the action after a general verdict, distinguishing from a special verdict, where something remains to be done by the court. *Young v. Hickens*, 1 Dav. & Mer. 599.

*Discontinuance, rule for, without the defendant's consent.]* The court has no jurisdiction to set aside a rule to discontinue, which now, by Reg. H. T. 2 Will. 4, may be obtained without the defendant's consent. *Potts v. Hurst*, 6 Man. & G. 934.

*Discontinuance after defendant's insolvency.]* A plaintiff will not be allowed to discontinue without payment of costs, on the ground of the defendant's insolvency, where he has taken a step in the cause after notice of such insolvency. *Ford v. Stott*, 11 Law J., Q. B. 235.

*Discontinuance after judgment on demurrer for the defendant.]* After judgment for the defendant, on a demurrer to one count of the declaration, the plaintiff served a rule to discontinue, and taxed and paid the defendant's costs. On a motion for an irregularity in the judgment signed by the defendant, the court intimated that the plaintiff was irregular in serving a rule to discontinue while there was judgment for the defendant as to part of the declaration, and that the plaintiff ought to have entered a nolle prosequi as to so much of the declaration as is not disposed of by the demurrer. *Benton v. Tolkington*, MS. Exch. M. T. 1846.

*Discontinuance after judgment on demurrer for the plaintiff—costs.]* After judgment on issues in law found against the defendant, and a rule to discontinue obtained by the plaintiff, on payment of costs, and a taxation for the costs of each made by the master, the plaintiff having taken out execution for the balance, the court refused to set it aside, as irregularly issued for a balance instead of the gross amount awarded for costs, and held the plaintiff entitled to his costs of the demurrs, notwithstanding the judgment of discontinuance. *Elwood v. Bullock*, 6 Ad. & El., N. S. 411.

One of several pleas having been demurred to, and issues joined on the other pleas, the plaintiffs, having succeeded on the demurrer, afterwards obtained the usual side-bar rule to discontinue, pursuant to Reg. Gen. H. T. 2 Will. 4, pl. 106, and taxed their costs. The master, on the taxation, allowed the plaintiff's costs on the demurrer against the defendant's costs on the discontinuance, and gave plaintiffs his allocatur for the balance:—Held, on motion to review the taxation, or to set aside the side-bar rule,—first, that the plaintiffs were entitled to the costs of the demurrer; and, secondly, that the defendant was not by the plaintiffs' proceedings deprived of his writ of error; but that he was entitled, if he required it, to a separate taxation of costs, and to an entry of judgment accordingly, with a view to his bringing a writ of error on the judgment on the demurrer. *Mayor &c. of Macclesfield v. Gee*, 14 Law J., Ex. 44.

*Discontinuance after plea of puis darrein continuance—costs.]* After a defendant has pleaded puis darrein continuance, the plaintiff may discontinue without payment of costs. *Wotton v. Smith*, 9 Ad. & E. 505.

*Costs on discontinuance.]* On a discontinuance the costs are discretionary, depending upon circumstances. *Poensgen v. Chanter*, 6 Scott, 300, C. P.

To constitute a discontinuance the costs must be paid; taxation alone is not sufficient. *Edginton v. Proudman*, 1 Dowl. 152, B. C.

After a plea of bankruptcy, the plaintiff is entitled to discontinue without payment of costs. *Wollen v. Smith*, 1 P. & D. 374.

On a discontinuance before notice of trial, the defendant is not entitled to the costs of the drafts of briefs. *Doe d. Postlewhaite v. Neale*, 2 Mee. & W. 732, Ex.

*Discontinuance, taxation of defendant's costs on.]* An action was discontinued after issue joined; and, on taxation, the master disallowed to the defendant the costs of copies of documents requisite for preparing the defendant's case, and also for counsels' fees for consultations upon the pleadings. The court would not direct a review of the taxation, though the case was one of importance and difficulty. *Rivis v. Watson*, 9 Law J., Ex. 100.

### DISTRINGAS JURATORES.

*Distringas juratores, how amended.]* The distringas may be amended by the venire, and the venire by the award of it on the roll. When the sheriff's return to the distringas has not been indorsed, the record may be withdrawn and the indorsement made, and the cause re-entered. *Masters v. Lewis*, 2 M. & Rob. 59.—Patteson, J.

It has been held that a judge has no power at Nisi Prius to order an amendment of the award of venire facias on the Nisi Prius record. *Adams v. Power*, 7 C. & P. 76.—Bolland, B.

*Distringas juratores, amendment of, after error brought.]* The writ of distringas juratores commanded the sheriff to have the bodies of the jurors in vacation, instead of on the first day of the following term, and was tested on the day on which it ought to have been returned:—Held, to be a misprision of the clerk, amendable under the statutes of amendment after error brought. *Cheese v. Scales*, 12 Law J., Ex. 14.

*Trial after return day of distringas juratores.]* Where a trial had taken place after the return day of the distringas juratores, the court refused to set aside the verdict and judgment on application made after the first four days of the following term, leaving the defendant to resort to his writ of error. *Cheese v. Scales*, 12 Law J., Ex. 13.

*Defective jury process, effect of.]* The court refused, on motion, to set aside a verdict for the plaintiff, on the ground that no distringas juratores had been returned before the trial, although the objection had been taken before verdict. *Gee v. Swann*, 9 Mee. & W. 685.

### DISTRINGAS.

*Affidavit to ground a distringas.]* The affidavit for a distringas is sufficient if it appears from the facts stated that the party is keeping

out of the way to avoid service without an express allegation of the deponent's belief as to that. *Channing v. Cross*, 9 Dowl. 118, B. C.

The affidavit must show, that the defendant was absent, or circumstances stated from which it must be inferred that he is keeping out of the way to avoid the process. *Houghton v. Howorth*, 4 Dowl. 749; and *Simpson v. Lord Graves*, 2 Dowl. 10.

To found an application for a distringas, it must be shown that the defendant is at home or in the neighbourhood during the time that the party calls to serve him. *Price v. Bower*, 2 Dowl. 1; and *Williams v. Hosier*, 1 T. & G. 805.

Where the only answer to the several calls was that the defendant was out of town:—Held, not sufficient for a distringas. *Waddington v. Palmer*, 2 Dowl. 7.

*Calls and appointments necessary to obtain a distringas.]* Although the general rule is that there must be three calls and two appointments to obtain a writ of distringas, that rule is not imperative, and does not prevent the exercise of the discretion of a judge in vacation, conferred by sec. 3 of 2 Will. 4, c. 39: and therefore an order of a judge in vacation, founded on an affidavit stating only two calls and one appointment, that such writ shall issue, will not be set aside for irregularity. *Gale v. Winks*, 6 Law J., C. P. 8; 3 Scott, 667; 5 Dowl. 348.

Two calls are sufficient on a motion for distringas. *Gregory v. Eastabrook*, 1 Dowl. & L. 881, B. C.

In the Common Pleas and Exchequer, the process may be left at the second call after one appointment. *Tapping v. Greenway*, 1 Dowl. N. S. 408; *Mills v. Boulbee*, 1 Dowl. N. S. 707.

The several calls need not be made by the same person. *Smith v. Good*, 2 Dowl. 398, B. C.

The attempts to serve a summons, in order to obtain a distringas, may be made in the same day, if it appear that the defendant is purposely keeping out of the way. *White v. Western*, 2 Dowl. 451.

In a later case it was held to be necessary that the calls should be made on different days. *Cross v. Wilkins*, 4 Dowl. 279.

A distringas will not be granted upon an affidavit of calls at the offices of the defendant unless it appear he has no place of residence. *Russell v. Knowles*, 8 Jur. 1058, C. P.; 8 Scott N. S. 716; 2 Dowl. & L. 595, C. P.

It is indispensably necessary to mention the hour in making an appointment. *Atkinson v. Clean*, 5 Dowl. 252; and *Newman v. Hickman*, 9 Dowl. 546.

The day and hour should be expressly mentioned in making an appointment. *Snow v. Keith*, 6 Jur. 995, B. C.—*Patteson, J.*; and *Wills v. Bowman*, 2 Dowl. 413.

The court refused to grant a distringas to compel an appearance, the affidavit not stating that any appointment had been made. *Todd v. Crosby*, 6 Scott N. R. 517; 5 Man. & G. 590.

The affidavit on which an application for a distringas is grounded must state where the house of the defendant at which the calls are made is situated. *Halton v. White*, 2 Man. & G. 295; and *Bowser v. Austin*, 2 C. & J. 45.

It must appear on the affidavit in what county the defendant resides,

otherwise the court cannot know to whom to direct the writ of distringas. *Bull v. Falkener*, 1 Dowl. & L. 913, C. P.

The affidavit for a distringas should state where the residence of the defendant is situated. *Crofts v. Brown*, 2 Dowl. & L. 935, Q. B.

And that the calls were made at the dwelling-house of the defendant. *Russell v. Knowles*, 7 Man. & G. 1001.

*Calls and appointments sometimes dispensed with.]* Special circumstances will sometimes induce the court to grant a distringas without the formality of calls and appointments. *Moody v. Morgan*, 7 Dowl. 144, C. P.; and *Hickman v. Dallimore*, 4 Dowl. 278, B. C.

*Affidavit for distringas must state that an appearance is not entered.]* In the affidavit on a motion for a distringas, it is not sufficient merely to negative the appearance of the defendant, according to the exigence of the writ. *M'Alpin v. Gregory*, 1 M. G. & Sc. 299; and *Drage v. Bird*, 3 Dowl. & L. 617, C. P.

And the affidavit must show when the search for the defendant's appearance was made. *Penny v. Thomas*, 6 Law J., C. P. 55.

*Keeping out of the way to avoid process sufficient for a distringas.]* On a motion for a distringas, the court allowed the distringas to issue, although the probability was, that the defendant had never heard of the applications and calls made, it being sworn and believed that he was keeping out of the way to avoid execution in another suit. *Archer v. Brindley*, 9 Dowl. 38, C. P.

*A distringas may issue against a defendant whose Christian name is unknown.]* Where the defendant's Christian name is unknown, and due efforts have been made to ascertain it without success, the court will grant a distringas to compel an appearance, with a blank left for the Christian name. *Fleming v. Slater*, 1 Dowl. & L. 696, Q. B.

*Distringas against a lunatic.]* If the defendant be in a lunatic asylum, and cannot be seen, the process may be served on the keeper. *Rawson v. Moss*, 8 Dowl. 412, Ex.; and *Jones v. Evans*, 6 Mee. & W. 420; 8 Dowl. 425.

But the court will not authorise the plaintiff to enter an appearance under the statute, where the defendant is a lunatic, and personal service of the distringas cannot be effected, unless they are satisfied that the keeper's attention has been drawn to the notice at the bottom of the writ, and its nature and object explained to him. *Spiller v. Benson*, 13 Law J., Ex. 114.

*Distringas allowed to be served on the wife of defendant a lunatic.]* Service of the distringas on the wife of the defendant, a lunatic confined in an asylum, and access to him refused, granted. *Limbert v. Hayward*, 13 Mee. & W. 481; 2 Dowl. & L. 406.

*A distringas will not be granted against a peer of Ireland residing there.]* On inquiring at the town residence of the defendant, who was a peer of Ireland, it appeared that the defendant was staying in Ireland, at his usual place of residence there. Calls were made and

a copy of the writ of summons left at his town residence: and another copy, enclosed to his address in Ireland. The defendant had taken no notice of these proceedings. The court refused to grant a distringas. *Hay v. Earl of Charleville*, 2 Dowl. & L. 16, Q. B.

*Distringas granted where the defendant's residence was unknown.]* Under special circumstances, the court will allow a writ of distringas to compel an appearance to be issued against a defendant, although his residence cannot be discovered, the usual service of the writ of summons by calls and appointments having been effected at his two last known places of abode, and on an agent for the receipt of his rents, who stated himself to be in communication with his principal. *Grindley v. Thorn*, 5 Dowl. 544, B. C.

*A distringas must accord with the writ of summons.]* A distringas ought to accord with the writ of summons, although the defendant's name is incorrectly stated in the latter; but the variance is an irregularity only, and will not render the distringas a nullity; and it is too late to take such an objection after eight days have elapsed from the return of the distringas. *Swift v. Knight*, 5 Mee. & W. 618; 7 Dowl. 863.

*Distringas granted, the defendant being abroad to avoid his creditors.]* Where the defendant was abroad at the time when the writ was sued out, having gone to avoid his creditors, but his servants remained in his house, the court, upon the usual affidavit, allowed the distringas. *Moon v. Thynne*, 3 Dowl. 153.

*Distringas refused, the defendant being abroad.]* If a party be abroad, and there is nothing to show he is absent to avoid his creditors, a distringas will not be granted. *Grover v. Hindmarsh*, 7 Dowl. 607, B. C.

If a defendant be in Ireland with his regiment, no distringas lies. *Evans v. Fry*, 3 Dowl. 581, B. C.

A statement by a clerk that his master is abroad, and he does not know when he will return, is not sufficient for a distringas. *Taylor v. Bush*, 8 Dowl. 613, B. C.

If the defendant is abroad, the proceedings will be set aside as irregular. *Partridge v. Walbunk*, 2 Mee. & W. 893.

*Distringas granted, the answers being, defendant ill in bed.]* The court granted a distringas where it appeared that the answer given on each of the three calls for the purpose of serving the writ was, that the defendant was ill in bed, and could not be seen, the nature of the visit being explained to the servant, without any statement that the defendant was keeping out of the way to avoid process. *Wilkins v. Jones*, 15 Law J., Q. B. 226; 1 B. C. Rep. 144,—Coleridge, J.

*Distringas refused where it appears defendant is from home.]* The court refused to allow a distringas to issue, where three applications had been made at the defendant's residence, and upon the second occasion the answer given was, that he was gone to Scotland, and on the third occasion, that he was gone to Calais; it not appearing

that those answers were untrue. *Beverley v. Christie*, 10 Law J., Ex. 128.

*Distringas to compel appearance after alias writ of summons.]* A writ of summons having issued and expired by lapse of time, the plaintiff sued out an alias, and having been unable to serve it upon the defendant, obtained a distringas, which stated that the distress was made because the defendant had failed to appear to the first writ. It did not appear that any attempt had been made to serve the first writ:—Held, that the distringas was not irregular on this account, and that the distringas and the alias writ might issue after expiration of the writ of summons. *Pearce v. Swain*, 10 Law J., Ex. 144; 7 Mee. & W. 543.

*Date of rule for distringas when granted on a subsequent day to the application.]* Where a rule for a writ of distringas is applied for on one day, but, from the court taking time to consider, it is not granted until another, it must be dated as of the former day. *Egan v. Rowley*, 8 Dowl. 145.

*Appearance entered after return of nulla bona to distringas.]* Where a distringas was issued, and nulla bona was returned, and the defendant was himself served with a copy of the writ, no affidavit being made that diligence had been used to execute the distringas in any other manner, the court granted a rule for entering an appearance. *Wood v. Kirkman*, 11 Law J., C. P. 288.

*Distringas returnable out of term, may be set aside after eight days.]* Where the distringas was made returnable on a day out of term, the application to set it aside allowed to be made after eight days from the execution, the defect being vital. *Badman v. Bateman*, 2 Dowl. & L. 130.

*Return of writ of distringas.]* A writ of distringas returnable on a Sunday is a nullity. *Morrison v. Manley*, 1 Dowl. N. S. 773; 6 Jur. 838, B. C.—Coleridge, J.

A writ of distringas returnable in vacation is a void and not merely an irregular writ. *Bateman v. Badham*, 13 Law J., Q. B. 263; 8 Jur. 910, B. C.—Wightman, J.

It was no objection to a writ, that it was made returnable on a day between the Thursday before and the Wednesday after Easter day, when they fell in Easter term. *Lilly v. Gompertz*, 1 Dowl. 376.

On sheriff's return of non est and nulla bona, the court will allow an appearance to be entered, but not on the same motion give leave to stick up notice of declaration in the office. *Copeland v. Neville*, 4 Dowl. 51.

After a sheriff's return that he has levied 40s. on a writ of distringas, an appearance may be entered by the plaintiff without an affidavit. *Page v. Hemp*, 4 Dowl. 203, Ex.

And no rule is necessary. *Tucker v. Brand*, 4 Dowl. 411; and *Barley v. Disney*, Ex. T. T. 1845.

On return of non est leave must be obtained. *Johnson v. Smeally*, 1 Dowl. 526, B. C.

*Appearance on sheriff's return to a distringas.]* A return of non est and nulla bona is not sufficient to authorise an appearance; there must be an affidavit showing the attempts to serve. *Waite v. Cook*, 9 Dowl. 139, B. C.

And should state what the inquiries were. *Copeland v. Nevill*, 4 Dowl. 51, K. B.

The affidavit of the sheriff's officer should show facts from which the court can see that he had done his best to find goods of the defendant, but cannot. *Piney v. Richardson*, 11 Jur. 413, C. P.

Merely stating that the deponent has "diligently endeavoured to serve the distringas," is insufficient. *Harris v. Gribble*, 3 Law J., Ex. 208; and *Scarborough v. Evans*, 1 Dowl. 9.

*Appearance on sheriff's return to distringas, defendant in furnished lodgings.]* Where a distringas is returned non est inventus, and nulla bona, and defendant's residence is a furnished lodging, attempts to execute the warrant should be made; the copy of the distringas, and warrant issued thereon should be left at the lodgings, and an affidavit made, whether the defendant had goods elsewhere. If none can be discovered, the plaintiff will be suffered to enter an appearance for defendant, and proceed to judgment and execution under 2 Will. 4, c. 39, s. 3. It cannot be made part of the above rule, that service of notice of declaration at the defendant's last known place of residence, and sticking up a declaration in the office, be deemed good service. *Cornish v. King*, 3 Dowl. 18; 3 Tyrw. 575.

*Appearance on sheriff's return to distringas, defendant in public office.]* In order to satisfy the court, under 2 Will. 4, c. 39, s. 3, that proper means have been taken to serve a distringas on a defendant, who was a clerk in the victualling office, in order to enter an appearance against him, it should be shown not only that his residence or property could not be discovered, but that attempts had been made to serve him at the victualling office. *Roucill v. Bower*, 4 Tyrw. 374.

*Distringas, computation of time between teste and return.]* The fifteen days which, by the Uniformity of Process Act, 2 Will. 4, c. 39, s. 3, must elapse between the teste and return of a writ of distringas are fifteen clear days.

The days between the Thursday before and the Wednesday after Easter-day are to be reckoned in the computation of such fifteen days. *Chambers v. Smith*, 12 Mee. & W. 2; 13 Law J., Ex. 25.

*A distringas cannot issue after four months from date of summons.]* A distringas sued out after the expiration of the four months allowed for the duration of the writ of summons is invalid, and will be set aside. *Abbotts v. Kelly*, 4 Scott, 256; 6 Law J., C. P. 112.

*A distringas allowed after the expiration of four months from issuing the summons.]* The Queen's Bench and the Exchequer have decided that a distringas may issue after the expiration of four months from the issuing of the writ of summons. *Bromage v. Ray*, 9 Dowl. 559, Q. B.; and *Pearce v. Swain*, 7 Mee. & W. 543; 9 Dowl. 724.

A *distringas* may issue within a reasonable time after the expiration of the four months from the issuing of the writ of summons. *Peyton and another v. Wood*, 15 Law J., Ex. 347.

These cases over-rule *Abbotts v. Kelly*, in the Common Pleas.

*A distringas to compel appearance, or for proceeding to outlawry.]* Under 2 Will. 4, c. 39, s. 3, a *distringas* must be issued either to compel an appearance or for proceeding to outlawry, but not in the alternative. *Fraser v. Case*, 1 Dowl. 725.

Proceedings to outlawry cannot be taken on a writ of *distringas* originally issued to compel an appearance. —— v. *Gowan*, 5 Dowl. 494.

*Service of writ at place of business for distringas for outlawry.]* A service upon a clerk at a party's place of business, when his residence cannot be found, may be sufficient for a *distringas* to proceed to outlawry. *Quære*, whether it is sufficient for a *distringas* to compel an appearance. *Rock and another v. Adam and another*, 15 Law J., C. P. 192.

*Distringas for outlawry may issue after alias and pluries writs.]* A *distringas*, for the purpose of proceeding to outlawry, may issue after a writ of summons which has been continued by alias and pluries, sued out to save the statute of limitations. *Reay v. Youde*, 2 Mee. & W. 188.

*To set aside a distringas.]* To set aside a *distringas*, application must be made within eight days after service. *Alexander v. Smith*, 12 Mee. & W. 30; 13 Law J., Ex. 47; 1 Dowl. & L. 467, Ex.

It is no ground for setting aside a *distringas* for irregularity, that the writ of summons is against Andrews Bryan, in an action on promises, and the *distringas* against the goods of "Andrew Bryan to answer in a plea of trespass on the case on promises." *Tyser v. Bryan*, 3 Law J., Ex. 183; 2 Dowl. 640.

*On return of nulla bona to distringas, and defendant being served, an appearance may be entered.]* Where a *distringas* was issued and nulla bona was returned, and the defendant was himself served with a copy of the writ, no affidavit being made that diligence had been used to execute the *distringas* in any other manner, the court granted a rule for entering an appearance. *Wood v. Kirkman*, 11 Law J., C. P. 288.

#### EJECTMENT—Declaration and notice—service.

*A constructive service of declaration and notice must be explicit.]* In motions for judgment against the casual ejector, where a constructive service of the declaration and notice on the tenant in possession is relied upon, the affidavit must state that the deponent served the tenant in possession, by delivering or leaving a copy of the declaration and notice with the persons upon whom the service was actually made, and under the circumstances which occurred. *Doe d. Piggott v. Roe*, 15 Law J., Q. B. 311; 1 B. C. Rep. 200.

*Service of declaration and notice must be on the tenant in possession.]* The service should be on the tenant in possession : a service on the last person in possession is insufficient, although there may be a difficulty, in ascertaining who is the tenant in possession. *Doe d. Fraser v. Roe*, 5 Dowl. 720.

The affidavit must state a service on the “tenant in possession,” the word “occupier” not being sufficient. *Doe d. Jackson v. Roe*, 4 Dowl. 609.

Nor is it sufficient to swear to service on a person who appears, from facts stated in the affidavit, to be in point of law the tenant in possession. *Doe d. Jones v. Roe*, 5 Dowl. 226.

Service upon the person in possession, is insufficient. *Doe d. Oldham v. Roe*, 4 Dowl. 714, Ex.

*Service obstructed by the tenant.]* Where the service in the usual way was prevented by the violent conduct of the tenant, and the notice was not read or explained, but thrown into the house, the court granted a rule for judgment. *Doe d. Ross v. Roe*, 7 Scott, 866.

Where it was sworn that the tenant was keeping out of the way to avoid service. The deponent went to the house sought to be recovered, and having been informed that the tenant was at home, he put a ladder against the drawing room window and got up to it. While there, believing that the tenant was in the room, he explained at the window the nature of the proceeding ; and a copy was stuck upon the door :—Held, sufficient. *Doe d. Colson v. Roe*, 6 Dowl. 765.

Where there is reason to believe that the person served is the tenant in possession, though he denies it, the court will allow judgment to be signed. *Doe d. Hunter v. Roe*, 5 Dowl. 553, B. C.

*Service of declaration where a party would not open the door.]* Service of a declaration was effected by passing the copy of the declaration and notice under the door of the dwelling-house, the party being in the house at the time, and refusing to open the door, or listen to the explanation given of the object and nature of the service :—Held, sufficient. *Doe d. Lowndes v. Roe*, 7 Mee. & W. 439 ; 10 Law J., Ex. 142.

*Service on a tenant who refuses to hear the notice read.]* Service of declaration and notice by showing them to the tenant on the premises, and reading over and explaining their nature and object to his clerk there, the tenant going away and refusing to listen :—Held, good service. *Doe d. Roberts v. Roe*, 6 Scott N. R. 833.

*Service on a tenant residing abroad.]* Where one of the defendants resided in Boulogne, in France, and had been personally served there, with a copy of the declaration, the court held, the service sufficient. *Doe d. Daniel v. Woodruffe*, 7 Dowl. 494, Ex.

*Service upon executors.]* Service of the declaration and notice in ejectment, upon one of two joint executors is sufficient. *Doe d. Strickland v. Roe*, 1 B. C. Rep. 210.—Patteson, J.

*Service where premises are underlet.]* Where there is an underlet-

ting the service should be on the actual occupier. *Doe d. Blair v. Street*, 2 Ad. & E. 329; 4 N. & M. 42.

*Service in case of bankruptcy.]* In case of bankruptcy service on the messenger and official assignee is sufficient. *Doe d. Baring v. Roe*, 6 Dowl. 456, C. P.

*Service on joint tenants.]* It is sufficient to serve one of several joint tenants. *Doe d. Clothier v. Roe*, 6 Dowl. 291, B. C.; and *Doe d. Worthay v. Roe*, 10 Jur. 984, B. C.—Patteson, J.

But the notice should be addressed to each, and the affidavit describe them as joint tenants. *Doe d. Williamson v. Roe*, 10 Moore, 493; *Doe d. Gaskell v. Roe*, 3 Tyrw. 84.

Service on the tenant of a joint-tenant who had underlet, is sufficient. *Doe d. Hutchinson v. Roe*, 2 Dowl. 418.

*Service on a tenant an attorney.]* The court will not relax the rules as to service of the declaration in ejectment, on the ground that the tenant in possession is an attorney. *Doe d. Fowler v. Roe*, 11 Jur. 184, B. C.

*Acknowledgment by an attorney of the receipt of notice by tenant.]* A subsequent acknowledgment of the declaration and notice having come to the hand of the tenant by his attorney, relied on in aid of an insufficient service, must show distinctly that the party is really the tenant's attorney in the matter. *Doe d. Reynolds v. Roe*, 1 Man. Gr. & S. 711.

*Acknowledgment by tenant of the receipt of notice.]* An acknowledgment by a tenant in possession, after the commencement of the term, that the declaration has come to his hands, is not sufficient, even for a rule nisi, unless the acknowledgment is that he received it before term, although the wife acknowledges that it came to her hands on the day before term. *Doe d. Finch v. Roe*, 5 Dowl. 225, B. C.

*Affidavit of service of declaration, &c. in ejectment.]* In an affidavit of service of a declaration in ejectment, the word "served" is not indispensably necessary if it appear from the affidavit that it has been duly served. *Doe d. Jenkins v. Roe*, 5 Dowl. 155.

An affidavit of service of declaration must state positively, not inferentially, the service to have been effected on the tenant in possession. *Doe d. Dalby v. Hitchcock*, 2 Dowl. N. S. 1, B. C.—Wightman, J.

An affidavit, as on one demise, bad, if there appear to be several demises. *Doe d. Cousins v. Roe*, 4 Mee. & W. 68; 7 Dowl. 53; and *Doe d. Thorn and another v. Roe*, 7 Scott, 172.

It is sufficient if the affidavit state that the notice and declaration were explained, without reading them over. *Doe v. Roe*, 1 Dowl. 427, K. B.

It is sufficient if the tenant reads the declaration and notice and says he understands it. *Doe d. Jones v. Roe*, 1 Dowl. 518.

Reading over and explaining to one of two parties jointly in possession, in the presence of the other:—Held, sufficient service. *Doe d. Jordan v. Roe*, 4 Dowl. 577.

It will suffice to read it over without explaining it, or to explain it without reading it over. *Doe v. Roe*, 1 Dowl. 428.—Patteson, J.

Where the affidavit stated that the deponent “had delivered the declaration to the wife on the premises,” instead of served:—Held, sufficient. *Doe d. Jenkins v. Roe*, 5 Dowl. 155, B. C.

If the declaration describes the lessors of the plaintiff as executors, an affidavit of service, omitting the words as executors, is sufficient. *Doe d. Jenks v. Roe*, 2 Dowl. 55; 3 Tyrw. 602.

The court refused to allow judgment to be signed against the casual ejector, upon an affidavit of constructive service upon “the tenants in possession, whose names were, as the deponent is informed and verily believes, W. B. and J. B.” *Doe d. Story v. Roe*, 5 Scott, N. R. 838.

*Explanation of the notice dispensed with.]* Where the tenant is an attorney, the usual explanation may be dispensed with. *Doe d. Duke of Portland v. Roe*, 4 Scott N. R. 22; 1 Dowl. N. S. 183.

*Service of declaration and notice on the wife of tenant.]* Service on the wife at the dwelling of the tenant, (not the premises in question,) if it appear that she is living with her husband at the time, is sufficient. *Doe d. Boulcott v. Roe*, 7 Dowl. 463; *Doe d. Wingfield v. Roe*, 1 Dowl. 693, B. C.; and *Doe d. Mingay v. Roe*, 6 Dowl. 182, C. P.

Service on the wife was held sufficient although not explained, she refusing to be informed of it. *Doe d. George v. Roe*, 3 Dowl. 541; and *Doe d. Frith v. Roe*, 3 Dowl. 569.

Service on the wife of the tenant in possession, although she refused taking it, and left on the premises, held sufficient for a rule nisi. *Doe d. Nash v. Roe*, 8 Dowl. 305.

Where the wife of the tenant in possession is seen at the first floor window, but refuses to come down and receive the declaration and notice, whose nature and purport are, however, fully explained verbally to her, and the notice and declaration are then placed under the door, the court granted a rule for judgment against the casual ejector. *Doe d. Grove v. Roe*, 8 Jur. 338, B. C.—Patteson, J.

*Service on a stranger—subsequent admission by tenant's wife.]* Service of a declaration in ejectment upon a stranger on the premises, with an admission by the tenant's wife, that the declaration and notice had come to her hands, was held sufficient for a rule nisi for judgment against the casual ejector. *Doe d. Grey Coat Hospital v. Roe*, 7 Man. & G. 537.

*Service of declaration and notice on relations of the tenant.]* Service on the son of the tenant, which the tenant acknowledges, without saying when, is not sufficient. *Doe d. Marshall v. Roe*, 4 N. & M. 553, K. B.

Service upon the son, upon an affidavit that the father was in the house at the time, allowed good; the counter affidavits not negativing that it did not come to the father before the first day of term. *Doe d. Protheroe v. Roe*, 4 Dowl. 385.

Where the service had been on the daughter of the tenant in possession, it must be shown that the daughter delivered it or explained it to the tenant. *Doe v. Roe*, 2 Dowl. 414.

Service on the daughter on the premises was held insufficient, even

for a rule nisi; although there may be reason to believe the wife is aware of the proceeding, and keeps out of the way to avoid being served. *Doe d. George v. Roe*, 3 Dowl. 9, B. C.

Service on the daughter, to whom it was explained, and her father being ill in bed, she took it up to him, and, on coming down, she said she had explained it to him:—Held, good. *Doe d. Cockburn v. Roe*, 1 Dowl. 692, Ex.

Service on the daughter of the tenant, at his residence, he afterwards called on the attorney, and said the time was coming when something must be done:—Held, sufficient. *Doe d. Agar v. Roe*, 6 Dowl. 624.

Where several attempts to serve the tenant in possession have failed, service on his daughter may be held good, if he do not expressly deny that the copy of the declaration has come into his hands. *Doe d. Fowler v. Roe*, 11 Jur. 309.

Service on the niece, who had delivered the notice, &c., to the tenant, her aunt, who was ill:—Held, sufficient. *Doe d. Eaton v. Roe*, 7 Scott, 124.

Where served on the son on the premises, and he afterwards stated that his father had received it, a rule nisi granted. *Doe d. Timmins v. Roe*, 6 Dowl. 965.

Service on the son on the premises, the tenant clearly keeping out of the way to avoid service:—Held, sufficient for the rule nisi. *Doe d. Luff v. Roe*, 3 Dowl. 575.

Service on the daughter on the premises where the tenant was bed-ridden, and the declaration said to have been delivered:—Held, sufficient for a rule nisi. *Doe d. Frost v. Roe*, 8 Dowl. 301, B. C.

Where the service was on the daughter-in-law on the premises, and she afterwards stated she had given it to the tenant, who said he would instruct his attorney:—Held, enough for the rule nisi. *Doe d. Sykes v. Roe*, 7 Scott, 121.

Service before the term on the daughter, on the premises, and acknowledgment by the wife, also before the term, that it had been given to the husband:—Held, sufficient for the rule nisi. *Doe d. Chaffey v. Roe*, 9 Dowl. 100, B. C.

Where, the tenant refusing to open the door, the notice was read and explained through the door, and afterwards delivered to the son on the premises:—Held, sufficient for a rule nisi. *Doe d. Grimes v. Roe*, 4 Dowl. 591.

The affidavit of service of a declaration in ejectment upon the son of the tenant, on the premises, before term, and of an acknowledgment by him, on the 20th of November, that he had given it to his father, must state the deponent's belief that what the son said was true. *Doe d. Overy v. Roe*, 1 Dowl. & L. 803, C. P.

A copy of a declaration, &c., in ejectment was served upon the tenant's daughter, upon the premises, two days before term, and, at the same time, another copy was sent by post, directed to the tenant, according to an address given by the daughter. In the absence of an acknowledgment by the tenant that he had received either copy before the first day of term:—Held, that such service was not sufficient for a rule nisi for judgment against the casual ejector. *Doe d. Pattison v. Roe*, 10 Jur. 34, B. C.—Patteson, J.

Service of a copy of the declaration, and a notice on a niece of the tenant, on the premises, on Saturday, the 21st of May, with a subse-

quent statement by her (she refusing to make an affidavit) that she gave it to the tenant on that or the following day, Monday, the 23rd, being the first day of term :—Held, insufficient even for a rule nisi. *Doe d. Hine v. Roe*, 5 Scott, 174.

Where service of the declaration, and notice in ejectment, was sworn to have been effected upon the mother-in-law of the tenant in possession, upon the premises, and that the wife of the tenant stated on the day before term that the papers had been handed to her: the court granted a rule nisi for judgment against the casual ejector. *Doe d. Morgan v. Roe*, 1 Dowl. 543; 6 Jur. 325, B. C.—Williams, J.

Where a person, with the view of serving a declaration in ejectment upon a tenant in possession of the dwelling-house sought to be recovered, went to the premises in question, and found them shut up, and the outer door locked or bolted, but saw a female there in an area under a grating, who stated she was the daughter of the tenant in possession, and to whom he gave and explained the declaration, with a request that she would give it to her father, which she promised to do; and afterwards, on a subsequent occasion, went to the premises, and found them in the same state as before, and saw the daughter again under the same circumstances, who then informed him that she had given the said declaration to her father, which he swore, he verily believed to be true: the court granted a rule nisi for judgment against the casual ejector. *Doe d. Farnecombe and others v. Roe*, 10 Jur. 525, Q. B.

Service in ejectment on the son of the tenant in possession, on the premises, is insufficient, unless it be shown that he is living with his parent, and composes part of the family. *Doe d. Emerson v. Roe*, 6 Dowl. 736, C. P.

*Service of declaration, and notice on the servant of tenant.]* A declaration and notice of ejectment were served upon a servant of the tenant, whose wife subsequently admitted that she had received it and given it to her husband:—Held, insufficient. *Doe d. Tucker v. Roe*, 4 M. & Sc. 165.

On a motion for judgment against the casual ejector, the affidavit alleged a service of the declaration and notice upon a servant of the tenant, upon the premises, the tenant being absent, and that the servant had subsequently stated that he had given them to his master:—Held, not sufficient. *Doe d. Thomas v. Roe*, 1 M. & Sc. 435.

Where the tenant was abroad, and it was uncertain when he would return, service on a servant on the premises held sufficient for a rule nisi. *Doe d. Mather v. Roe*, 5 Dowl. 552, B. C.; and *Doe d. Morpeth, v. Roe*, 3 Dowl. 577; and *Doe d. Treat v. Roe*, 4 Dowl. 278.

Service on the premises on an agent of the tenant, who had absconded to America:—Held, sufficient for a rule nisi. *Doe d. Robinson v. Roe*, 3 Dowl. 11, B. C.

Where premises underlet to tenants were found unoccupied only recently before the application, and the inquiry had been made only as to the lessee, and the declaration left with his servant, not on the premises, the court refused to give judgment. *Doe d. Burrows v. Roe*, 7 Dowl. 326.

*Service of declaration and notice on a servant, the tenant subsequently*

*acknowledging same.]* Where the service of the declaration and notice was effected on a servant of the tenant in possession, on the premises, and the day after the commencement of term, the tenant consented that the service should be sufficient, and at the time the tenant had the declaration and notice in his hands, but he had not admitted that the papers reached him before term; the court granted a rule nisi for judgment against the casual ejector. *Doe d. Middleton v. Roe*, 1 Dowl. & L. 149, Q. B.

*Service of declaration, &c. in ejectment on servant of tenant bad.]* An affidavit, stating that a copy of the declaration in ejectment had been delivered to a servant of the tenant in possession, who was left in care of the premises, is insufficient to move for judgment against the casual ejector, and the court will not even grant a rule to show cause on such an affidavit. *Doe d. Read v. Roe*, 1 Mee. & W. 633; *Doe d. Lord Dinorben v. Roe*, 2 Mee. & W. 374.

*Service of declaration on servant and subsequent explanation to tenant insufficient.]* Service of the copy of a declaration in ejectment on the female servant of the tenant in possession, upon the premises, and a subsequent conversation by the attorney of the lessor of the plaintiff, with the tenant, not on the premises, in which the attorney explained to him the nature of the declaration, and of the service:—Held, not sufficient service. *Doe d. Shepherd v. Roe*, 10 Law J., Q. B. 129.

*Service on a clerk.]* Service on a clerk of the tenant (an attorney) who in his absence accepted service thereof for him: Held, sufficient. *Doe d. Gower v. Roe*, 6 Scott N. R. 41.

*Service on lodgers.]* Where lodgers in a house cannot be served, service on the keeper of the house, at the house is sufficient for a rule nisi for judgment against the casual ejector. *Doe d. Threader v. Roe*, 1 Dowl. 261, B. C.—Patteson, J.

*Service on an agent.]* Where service is on an agent of a tenant, the tenant being abroad, the agency must be distinctly sworn to; and it is not sufficient that the party serving the declaration has been informed by the party served, and believes that such party is agent. *Doe d. Nottage v. Roe*, 4 M. & G. 28; 4 Scott N. R. 706.

*Ejectment for lands—service on agent—tenant's residence not known.]* In ejectment for lands upon which there is no house, and the tenant's residence cannot be ascertained, service of the declaration and notice upon the tenant's agent, leaving copies at his last ascertained dwelling-house, and affixing a notice in a conspicuous part of the land, is a sufficient ground for a rule nisi for judgment against the casual ejector. Semble, that in such a case, service on the agent alone would be sufficient. *Doe d. Johnson v. Roe*, 12 Law J., Q. B. 96.

*Service of declaration and notice on a tenant supposed to be abroad.]* Where the tenant in possession of premises, had quitted and could not be found, and it was believed had gone to America, and service of the declaration and notice was effected on the premises, upon a person

who appeared to be employed as agent to see that the house was kept in repair, and by sticking copies on the door of the house; the court granted a rule nisi for judgment against the casual ejector, and upon affidavit of service of the rule, in the same manner as the declaration and notice made the rule absolute. *Doe d. Taboy v. Roe*, 1 Dowl. & L. 118, Q. B.

*Service of declaration in ejectment on the clerk of a canal company.]* In ejectment for part of the bed of a canal, service of the declaration on the clerk of the canal company at their office, was held sufficient for a rule nisi for judgment against the casual ejector. *Doe d. Fisher v. Roe*, 10 Mee. & W. 21.

*Service of declaration, &c. on the proprietors of a company not incorporated.]* Where the proprietors of a company not incorporated, were tenants, and a third party in actual occupation of a piece of land for which the ejectment was brought, service of the declaration on several of the proprietors, and on the clerk and treasurer of the company, and on the occupier was held sufficient service; it being sworn that the proprietors of the company were believed to be joint tenants of the land in question. *Doe d. —— v. Roe*, 1 Dowl. & L. 873, Q. B.

*Service on public companies.]* Where a railway company is in possession of land for which an ejectment is brought, service of the declaration and notice on the secretary of the company is sufficient by the 8 & 9 Vic. c. 16, s. 135. *Doe d. Burgess v. Roe*, 10 Jur. 952.

Service of a declaration upon a railway company according to the mode prescribed in their act, is absolute in the first instance. *Doe d. Bromley v. Roe*, 8 Dowl. 858, Ex.

Service on a clerk of commissioners in whom land is vested, is not sufficient. *Doe d. White v. Roe*, 8 Dowl. 71, C. P.

Service of a declaration, &c. on the clerk of an incorporated company, (not empowered to sue and be sued in the name of their clerk), on a portion of the premises, but was not resident there, is sufficient for a rule nisi. *Doe d. Ross v. Roe*, 5 Dowl. 147, B. C.

*Service—no one residing on the premises.]* In ejectment for a schoolhouse in which no one resided, the declaration and notice were served upon a servant who kept the keys, and upon the schoolmaster, on the premises:—Held, not sufficient for a rule nisi for judgment against the casual ejector. *Doe d. King v. Roe*, 1 B. C. Rep. 39—Williams, J.

*Vacant possession.]* Houses being uninhabited and unfurnished must be proceeded for as in case of vacant possession. *Doe d. Schovell v. Roe*, 3 Dowl. 691.

If a house be underlet, and afterwards totally deserted, the landlord cannot resume possession; he must bring an ejectment under the statute as on a vacant possession. *Doe d. Norman v. Roe*, 2 Dowl. 428.

Slight acts will constitute an entry, in case of vacant possession. *Doe d. Frith v. Roe*, 2 Dowl. 431.

The affidavit of their being no sufficient distress on the premises must be positive; the deponent's belief will not do. *Doe v. Roe*, 2 Dowl. 413.

*Service where premises vacant.]* In an ejectment for seven houses adjoining each other, and held under one lease, the tenants of four having been duly served, the court granted a serviceable rule absolute, as to the other three, which were empty, upon an affidavit, stating that the tenant had left them, and embarked with his family for America; that the lessee was dead, intestate, and insolvent; and that copies of the declaration and notice had been affixed on the outer doors of the three houses, and a copy served on one D., the attorney for one Jones, who had been in the habit of receiving the rents. *Doe d. Pope v. Roe*, 7 Man. & G. 602.

*Declaration in ejectment not within the Rules M. T. 3 Will. 4.]* The rules of M. T. 3 Will. 4, were framed upon the act of parliament, and apply only to cases to which the act applies. The act is “An Act for the Uniformity of Process in Personal Actions,” and its provisions extend only to such actions. Ejectment being a mixed action is not, therefore, within either the act, or the rules. *Doe d. Gillett v. Roe*, 1 C. M. & R. 19; 4 Tyrw. 649.

*Date of declaration in ejectment.]* Where a declaration in ejectment was entitled of “Trinity term, 9 Victoria,” which had not arrived, and the notice, which was not dated, called on the tenant to appear in next “Michaelmas term,” the court granted a rule for judgment against the casual ejector. *Doe d. Gyde v. Roe*, 15 Law J., Ex. 8; 14 Mee. & W. 788; and *Doe d. Woodroffe v. Roe*, 5 Scott N. R. 800.

*Notice to appear in a term which has passed.]* The Court of Exchequer granted a rule nisi against the casual ejector in Hilary term, where the notice at the foot of the declaration required an appearance in Michaelmas term, but service could not be effected in time to move in that term. *Doe d. Earl of Warwick v. Roe*, 10 Law J., Ex. 130.

*Notice to appear in a country cause.]* Where, in a country ejectment, the notice to appear required the tenant to appear on the first day of Michaelmas term, the court refused a rule for judgment against the casual ejector,—or even a rule nisi. *Doe d. Burton v. Roe*, 11 Jur. 45, C. P.; 16 Law J., C. P. 86.

In a town cause the notice must require the defendant to appear on the first day of the next term. *Doe d. Holder v. Rushworth*, 4 Mee. & W. 75; 6 Dowl. 712.

*Notice omitting the Christian name of tenant.]* The Christian name of the tenant in possession was omitted in the notice to appear, and at the time of service the tenant refused to supply it:—Held, that the notice was sufficient. *Doe d. Lewthwaite v. Roe*, 1 B. C. Rep. 20—Williams, J.

*Declaration and notice.]* The omission of the name of the court in entitling a declaration in ejectment, is immaterial if the notice at the foot of the declaration gives the requisite information. *Doe d. Tattersall v. Roe*, 8 Dowl. 612.

It is no objection to a declaration in ejectment, that no attorney’s name has been introduced into it. *Doe d. Simpson v. Roe*, 6 Dowl. 469.

The court granted a rule for judgment against the casual ejector, though the declaration was not entitled in any court; the notice requiring the tenant to appear in the common bench. *Doe d. Gibson v. Roe*, 4 Scott, 434.

Where a declaration in ejectment was entitled of Hilary term, and the notice, dated 24th May, 1843, required the tenant to appear in next Easter term, the court set aside the judgment against the casual ejector. *Doe d. Beaumont v. Roe*, 1 Dowl. & L. 345, Ex.

The court refused a rule for judgment against the casual ejector where the notice required the tenant (in a country cause) to appear on the first day of next Easter term. *Doe d. Jacques v. Roe*, 8 Scott, 32.

An error in the title of a declaration in ejectment, such as entitling it of a term not yet arrived, will not disentitle the lessor of a plaintiff to a rule for judgment though there be no date to the notice to appear. *Doe d. Roberts v. Roe*, 8 Jur. 1169, B. C.—Patteson, J.

The court granted a rule nisi for judgment against the casual ejector, where the declaration was entitled the 29th Dec. as of Michaelmas term, in the 8th year of the Queen, and the notice which was without a date was to appear in next Hilary term. *Doe d. Saunders v. Roe*, 12 Mee. & W. 556; 1 Dowl. & L. 655.

A declaration was entitled of Hilary term, 8 Vic. (a term not then arrived) and the notice was to appear in "next Easter term," but bore no date. The service, which was regular, was in March last. The court granted a rule for judgment against the casual ejector. *Doe d. Yeomans v. Roe*, 2 Dowl. & L. 23, Q. B.

A declaration in ejectment need not be entitled of a term, or of a particular day as of a term. It is sufficient if it be entitled of a particular day. *Doe d. Ashman v. Roe*, 1 Bing. N. C. 253; 1 Sc. 166.

Where the declaration was entitled "Easter term, 4 Will. 4," no such term having yet arrived, the court held the error to be immaterial. *Doe d. Fry v. Roe*, 3 M. & Sc. 371; and *Doe d. Green v. Roe*, 8 Scott, 385.

Where the declaration was wrongly entitled of Michaelmas term, 1840, with notice to appear in the "next Michaelmas term," the declaration was served before the commencement of the term, and the tenant then said that he knew that no step could be taken until the following March. The court refused to grant the rule. *Doe d. Channell v. Roe*, 9 Dowl. 67.

The venue in the margin in the declaration in ejectment is immaterial if the venue in the body of the declaration be correct. *Doe d. Goodwin v. Roe*, 3 Dowl. 323.

The formal commencement of the declaration in ejectment is not material. *Doe d. Bloxam v. Roe*, 3 Mee. & W. 187; 6 Dowl. 388.

*Description of the premises in declaration in ejectment.]* "Tenement" is an incorrect expression in a declaration; but judgment will not be arrested where it is used in conjunction with "messuage." *Doe d. Lawrie v. Dyeball*, 8 B. & C. 70; 2 M. & R. 184.

The omission in the declaration of all local description of the tenement demised is error, although the county and vill in which the demise was made are stated in the declaration, and the county is stated in the margin. *Doe d. Rogers and others v. Bath*, 2 N. & M. 440.

It is sufficient if the parish be described by the name by which it is usually called. *Doe d. Boys v. Carter*, 1 Y. & J. 492.

If, on the trial of an ejectment, it appears that the parish is misstated in the declaration, the judge will allow it to be amended under the stat. 3 & 4 Will. c. 42, although the ejectment be for a forfeiture. *Doe d. Marriott v. Edwards*, 6 Car. & P. 208; 1 M. & R. 319.—Parke, B.

The court refused to arrest the judgment on account of the omission of a parish or vill. *Doe d. Edwards v. Gunning*, 7 Ad. & Ell. 253.

*Ouster.]* The ouster should be stated to have been after the commencement of the supposed demise, and it is not unusual, though unnecessary, to mention a particular day. See *Cro. Jac. 311*; *Selw. N. P. 683*, 4th ed.

*Amendment of declaration in ejectment.]* In ejectment by the heir of the mortgagor against the heir of the mortgagee, to recover the demised premises, the cause stood over from time to time after issue joined, in consequence of negotiations between the parties for a settlement, until the demise in the declaration had expired by lapse of time. The court permitted the declaration and issue to be amended by extending the term of the demise, although more than twenty years had elapsed since the execution of the mortgage. *Doe d. Rabbits and others v. Welsh*, 10 Jur. 1056, B. C.

Where a mistake has been made in the Christian name of the lessor of the plaintiff, and no one has appeared, the court will not allow the declaration to be amended by altering the name. *Doe d. Street v. Roe*, 8 Dowl. 444.

An amendment in ejectment may be made even in the time of the demise, to prevent being barred. *Doe d. Hardman v. Pilkington*, 4 Burr. 2447.

An amendment was allowed where the day of the demise was laid before the title accrued. *Doe d. Rumford v. Miller*, 1 Chit. 536.

So upon payment of the costs of the application, by laying the demise anterior to the time of forfeiture, even after the record was made up and the cause set down for trial. *Doe d. Rumford v. Miller*, Adams' Eject. 199.

*Declaration—statement of demise.]* A demise, on the day of a supposed forfeiture accruing, to commence from two days previous, is good. *Doe v. Wells*, 2 P. & D. 396.

Under a joint demise, a several title cannot be shown. Therefore a joint demise cannot be supported as the several demises of one or more of the lessors whose title is proved at the trial; and where the demise is by one parcener jointly with another parcener and her husband, whose title jure uxoris, is barred by fine and non claim, there cannot be a verdict for the plaintiff. *Doe d. Blight v. Pitt*, 11 Ad. & E. 842; 4 P. & D. 278.

If a declaration allege a joint demise, and the evidence proves them to be tenants in common, the declaration cannot be supported. *Doe d. Poole v. Errington*, 3 N. & M. 646.

*Declaration and notice—date of.]* A declaration in ejectment dated

the 8th, instead of the 7 Will. 4, is irregular; *Doe d. Gowland v. Roe*, 5 Dowl. 273; and *Doe d. Vincent v. Roe*, 9 Dowl. 43.

But if the date of the notice in the declaration conveys sufficient information to the tenant, the defect is cured. *Doe d. Evans v. Roe*, 5 Dowl. 508; and *Doe d. Smithers v. Roe*, 4 Dowl. 374; 7 Scott, 520.

*Declaration and notice—entitling of.]* Where a declaration in ejectment was entitled in the Common Pleas, but the notice to appear was in the Exchequer, the court on cause being shown, refused to make the rule absolute for judgment against the casual ejector, but directed an appearance to be entered. *Doe d. Knowles v. Roe*, 12 Mee. & W. 569; 1 Dowl. & L. 590; 13 Law J., Ex. 129.

A variance in the title of the court, in the notice and declaration will render the whole invalid. *Ib.*

The court refused to grant a rule for judgment against the casual ejector where the declaration was entitled “the Exchequer of Pleas,” and the notice required the tenant to appear in the Common Pleas. *Doe d. Phillips v. Roe*, 7 Scott, 891; 1 Dowl. & L. 915, C. P.

*Notice, where there are several tenants.]* Where there are several tenants in possession in ejectment, each copy of the notice may be directed to the individual tenant on whom it is served. *Doe v. Roe*, 8 Jur. 360, B. C.—Patteson, J. And one rule suffices, *Doe v. Roe*, 2 C. & J. 670.

Where the notice at the foot of a declaration in ejectment is addressed to all the tenants in possession of distinct parts of the premises, and each tenant is served with a copy addressed to all, there should be only one rule for judgment. *Doe d. Vorley v. Roe*, 2 Dowl. 52; 6 Jur. 931, B. C.—Wightman, J.

*Of the notice to appear.]* The notice attached to the declaration contained no date. The court, however, held it good without date, as the delivery would be deemed the day. *Doe d. Greene v. Roe*, 8 Scott, 385.

The date in the notice cures the entitling of the declaration. *Doe d. Gore v. Roe*, 3 Dowl. 5, B. C.

If, from the conduct of the tenant and his wife, his Christian name cannot be stated in the notice, it may be omitted. *Doe d. Warne v. Roe*, 2 Dowl. 517.

A variation in the name of the notice subscribed Thomas for John, the party served being told that he was the person intended, is immaterial. *Doe d. Frost v. Roe*, 3 Dowl. 563, B. C.

If the name of one tenant is improperly spelled in the notice served on another, it is immaterial for the service on the latter. *Doe d. Messer v. Roe*, 5 Dowl. 716, B. C.

Where there are several tenants, the notice must contain the names of the whole, and not that of each particular tenant only. *Doe d. Ludford v. Roe*, 8 Dowl. 500.

Where the notice was to the tenant to appear “next Easter term;” it was dated 13th May, 1837; and the affidavit of service stated that the deponent had explained to the tenant in possession, that the object of the service was to require him to appear in the next Trinity term:—Held, sufficient. *Doe d. Symes v. Roe*, 5 Dowl. 667.

*A new demise allowed to be added after a new trial granted.]* After verdict for the lessors of the plaintiff, and a new trial granted, the court allowed, upon payment of costs, a new demise to be added to the declaration, upon an affidavit, stating that it would not affect the merits of the question; the lessor of the plaintiff agreeing, that any evidence for the defendant, admissible under the former, should also be admissible under the new demise. *Doe d. Bacon and another v. Brydges*, 1 Dowl. & L. 954, C. P.

*Amendment at Nisi Prius of the day of the demise.]* A judge at Nisi Prins may, under the stat. 3 & 4 Will. 4, c. 42, s. 23, amend a declaration in ejectment, by an alteration in the date of the demise, whether the day laid in the declaration is a wrong day or an impossible day. *Doe d. Simpson v. Hall*, 1 Dowl. & L. 49, C. P.; and *Doe d. Edwards and another v. Leach*, 10 Law J., C. P. 289.

*Amendment at Nisi Prius by inserting the year of the demise in declaration irregular.]* The judge at the trial having amended a declaration in ejectment, under the authority of 3 & 4 Will. 4, c. 42, s. 23, by inserting the year of the demise, the court held, that this was not a variance between the proof and the record, and therefore was not amendable under that statute; but they discharged a rule obtained by the defendant to enter a nonsuit. *Doe d. Parson v. Heather*, 10 Law J., Ex. 296.

*Striking out demises in declaration in ejectment.]* Where parties have been served with a declaration in ejectment, the court will not before appearance entertain an application to strike out some of the demises in the declaration, on the ground that the lessors of the plaintiff named in those demises are deceased. *Doe d. King William the 4th v. Roe*, 13 Law J., Ex. 304; 8 Jur. 476.

*Landlord and tenant.]* The court will not grant a rule nisi, according to the statute 1 Geo. 4, c. 87, where the tenant refuses to deliver up possession, unless the notice at the foot of the declaration served is in the form prescribed by that statute. *Doe d. Warren v. Roe*, 6 Law J., C. P. 241.

In moving for the ordinary landlord's rule, under 1 Geo. 4, c. 87, s. 1, the affidavit in support of the application must have the plaintiff's lessor's name in its title. *Doe d. Watson v. Roe*, 5 Dowl. 389.

In order to obtain the usual landlord's rule, provided by 1 Geo. 4, c. 87, s. 1, the execution of the lease may be proved by the affidavit of a person who is not the attesting witness. *Doe d. Gowland v. Roe*, 6 Dowl. 35.

Where the lease provided, that on non-payment of a half year's rent the landlord might enter on the premises for the same until it should be fully satisfied:—Held, that the 4 Geo. 2, c. 28, did not operate to dispense with the formal demand of possession. *Doe d. Darke v. Bowditch*, 15 Law J., Q. B. 266; 10 Jur. 637.

In ejectment, a question arising as to the tenant disputing his lessor's title, the court said, the principle is, that a tenant shall not

contest his landlord's title; on the contrary, it is his duty to defend it. If he objects to such title let him go out of possession. *Doe d. Manton v. Austin*, 2 M. & Sc. 107; 9 Bing. 41.

Or if he has admitted his landlord's right by the payment of rent. *Doe d. Harvey v. Francis*, 4 M. & W. 331; 7 Dowl. 523.

A tenant at sufferance, who is turned out of possession by his landlord, without any demand of possession, cannot maintain ejectment, but may maintain trespass. *Doe v. Murrell*, 8 C. & P. 134.

The landlord has no right to appear until a rule for judgment against the casual ejector had been obtained. *Doe d. Emery v. Roe*, 7 Scott, 769.

In the absence of a suggestion of collusion between the lessor of the plaintiff and the tenant, the court will not set aside a regular judgment in ejectment after execution, in order to let in the landlord to defend. *Doe d. Thompson v. Roe*, 2 Scott, 181; 4 Dowl. 115.

But where a proper case for interference was made out, the court, even after execution on the judgment against the casual ejector, let in the tenants to plead. *Doe d. Mullarky v. Roe*, 11 A. & E. 333; 3 P. & D. 316.

*A sub-lessee held to be a tenant under 4 Geo. 2, c. 28, s. 4.]* A sub-lessee held to be a tenant within the provisions of 4 Geo. 2, c. 28, s. 4, and entitled to a stay of proceedings on payment into court of the rent in arrear. *Doe v. Byron*, 3 Dowl. & L. 31, C. P.; 1 Man. Gr. & S. 623.

*Judgment under 4 Geo. 2, c. 28, where no appearance by tenant.]* The statute 4 Geo. 2, c. 28, s. 2, does not enable the lessor of the plaintiff in any case to enter judgment against the tenant in possession, in a case where he has never actually appeared, but the judgment must still be against the casual ejector in the usual way. *Doe d. The Trustees of the Bedford Charity v. Payne*, 14 Law J., Q. B. 246.

The statute 1 Geo. 4, c. 87, s. 1, enabling landlords to recover possession of premises unlawfully held over by tenants, does not extend to the case of a subsisting lease, a condition of which has been broken, and a right of re-entry has accrued. *Doe d. Cundey v. Sharpley*, 15 Law J., Ex. 341.

Where the right of entry accrues to a landlord in or after Hilary or Trinity term, he may, under 11 Geo. 4 and 1 Will. 4, c. 70, s. 36, at any time within ten days afterwards, serve a declaration in ejectment, specially entitled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice thereunder subscribed, requiring the tenant in possession to appear and plead thereto within ten days. This is confined to issuable terms only. *Doe v. Roe*, 2 C. & J. 45.

The statute applies only to issuable terms and the assizes. *Doe d. Norris v. Roe*, 1 Dowl. 547.

And does not apply where the tenancy expired before the first day of the issuable term. *Doe d. Summerville v. Roe*, 4 M. & Sc. 747.

*Securities under 1 Geo 4, c. 87.]* Where a landlord applies to the court to compel his tenant to give the securities required by the 1 Geo.

4, c. 87, it may also be made part of the rule, that the landlord shall be at liberty to sign judgment against the casual ejector, in case of a default on the part of the tenant to give the required securities. *Doe v. Roe*, 2 Dowl. 180.

*Ejectment where part of the premises is underlet, and the remainder abandoned.]* Where a tenant has underlet part of the premises sought to be recovered, and abandoned the remainder, and a declaration has been served on the sub-tenants, the lessor of the plaintiff is entitled to judgment as to the part occupied by them, and may take possession of the remainder. *Doe d. Henson v. Roe*, 1 Dowl. & L. 657, Ex.

*Error in the Christian name of tenant no ground for setting aside.]* The court refused to set aside service of the declaration on an affidavit of misnomer in the Christian name of the tenant in possession; it would in effect be to allow the benefit of a plea in abatement for misnomer in ejectment. *Doe d. Stainton v. Roe*, 6 M. & Sc. 203.

*Consent rule should be drawn up and served before issue joined.]* The defendant having obtained the usual landlord's rule, and entered into the usual agreement for the common consent rule, and having pleaded and served rule to reply, the lessor of the plaintiff delivered the replication (the similiter) without drawing up and serving the consent rule: —Held, irregular, and replication set aside. *Doe d. Burnham v. Lever*, 13 Mee. & W. 688; 2 Dowl. & L. 644.

*Consent rules, where defendants separately defend for parts of the premises.]* Where two parties delivered separate consent rules, claiming to defend, the one for the whole of the premises in the declaration, and the other for part, the court directed the consent rules to be amended, by confining them respectively to such part of the premises as each party really defended for. *Doe d. Lloyd and Jones v. Roe*, 15 Law J., Ex. 283; 15 Mee. & W. 431.

*Consent rule—tenant denying possession.]* If a tenant denies he is in possession, and undertakes that execution may issue if he be, his name will be struck out of the appearance and consent rule. *Doe d. Snape v. Snape*, 2 C. & J. 214; 2 Tyrw. 340.

If a fraud be practised with respect to the consent rule, the court will interfere. *Doe v. Jordan*, 4 Scott, 370.

*The usual consent rule in ejectment applies to corporate bodies.]* A municipal corporation cannot be let in to defend an ejectment, without entering into the usual consent rule to admit possession, notwithstanding the provisions of the Municipal Corporation Act, 4 & 5 Will. 4, c. 76, s. 92; *Doe d. Parr v. Roe*, 10 Law J., Q. B. 317.

*Consent rule, production of, at trial.]* At the trial of an ejectment it is not necessary to produce the consent rule, there being no doubt of the identity of the premises sought to be recovered. If the defen-

dant appear at the trial, and refuse to confess lease, entry, and ouster, the lessor of the plaintiff is not entitled to have a verdict for him, but must be nonsuited, and will then recover judgment against the casual ejector. *Doe v. Armfield*, 11 Law J., Q. B. 43.

If a defendant appear by counsel, and cross-examines witnesses, he cannot afterwards call for the consent rule, there being no question as to the identity of the premises, and the plaintiff will be entitled to judgment. *Doe d. Greaves v. Raby*, 2 B. & Ad. 948.

*Staying proceedings in ejectment by payment of rent in arrear.]* A sub-lessee is a tenant of premises within the meaning of the stat. 4 Geo. 2, c. 28, s. 4, and is therefore entitled to a stay of proceedings upon payment into court of the rent in arrear and the costs. *Doe d. Wyatt v. Byron*, 3 Dowl. & L. 31.

*Staying proceedings in a second ejectment until costs of former paid.]* Where the same title was to be brought in question, although by deaths the parties had changed, the court held it within the rule for staying proceedings in the second ejectment, until the costs of a former one had been paid, and the devisee of the former defendant is entitled to make the application, and the affidavit may be entitled in the name of the casual ejector. *Doe d. Mudd v. Roe*, 8 Dowl. 444.

*Staying proceedings in ejectment pending action for trespass on the same question.]* The court will not stay the proceedings in an action of ejectment, commenced in this court, until those in an action of trespass, commenced in the Court of Queen's Bench, in which the same question is raised, are terminated. *Doe d. Geldart v. Tabrum*, 6 Law J., C. P. 303; 5 Scott, 141.

*Motion for judgment after the term mentioned in the notice.]* If a regular service is effected before the term in which the appearance is to be entered elapses, a motion for judgment may be made in the following term on the same service. *Doe d. Thompson v. Roe*, 3 Dowl. 575, K. B.

*Rule for judgment in ejectment mored the term following the notice.]* It is not too late to move for judgment against the casual ejector in the term following that in which the tenants have had notice to appear, whether the cause be a town or a country cause. *Doe d. Walker v. Roe*, 9 Mee. & W. 426; 1 Dowl. N. S. 613; 6 Jur. 263.

In a country cause it is a rule absolute which must be served, see *Doe d. Thompson v. Roe*, ante. In a town cause it a rule to show cause.

Where it appeared that a term had elapsed between the service and the motion for judgment against the casual ejector, the court only granted a rule nisi. *Doe d. Musselwhite v. Roe*, 8 Scott, 471; *Doe d. Wilson v. Roe*, 4 Dowl. 124.

And after four terms, a term's notice is necessary. *Doe d. Vernon v. Roe*, 2 N. & P. 237.

*Tenant must appear before he can move to set aside an irregular judgment.* The court will not before appearance by the tenant in an action of ejectment entertain an application to set aside the judgment signed against the casual ejector on the ground of irregularity. *Doe d. Williamson and another v. Roe*, 15 Law J., Q. B. 39; 3 Dowl. & L. 328.

*Judgment by default may be signed without entering appearance.]* It is not necessary in this court to enter an appearance for the casual ejector previously to signing judgment by default in ejectment, and the costs of doing so will not be allowed. *Doe d. Morgan v. Roe*, 2 Mee. & W. 423; 5 Dowl. 605; and *Doe d. Welhon v. Roe*, 5 Dowl. 271.

*Lessor's title.]* If a copyholder lease for years, without license from the lord, or custom authorising such lease, the lessee has nevertheless a title against every one but the lord, and may bring ejectment. *Doe d. Tresidder v. Tresidder*, 1 Ad. & El. N. S. 416.

If a copyholder make a lease which is not according to the custom of the manor, the lessee may nevertheless maintain ejectment thereon. *Doe d. Robinson v. Bousfield*, 1 Car. & K. 558; 8 Jur. 1121, Q. B.

*Summons for particulars and for time to plead in ejectment.]* In ejectment a party claiming to be landlord took out a summons for particulars of the premises, and also a summons for time to appear and plead. An order was made for the delivery of particulars, but containing no clause for a stay of proceedings: on the other summons an order was made for a week's time to plead:—Held, that the order for particulars did not operate as a stay of proceedings. *Doe d. Roberts and others v. Roe*, 2 Dowl. & L. 673; 14 Law J., Ex. 101.

*A second writ of possession granted.]* Where the writ of habere facias possessionem has been executed, and possession has been given to the lessor of the plaintiff, but the tenant subsequently forcibly dispossesses him, this court will grant a new writ, but the rule for such writ is only nisi in the first instance. *Doe d. Lloyd v. Roe*, 2 Dowl. N. S. 407; 7 Jur. 352, B. C.—Wightman, J.

*Ejectment, sheriff's return to elegit, description of premises.]* An ejectment was brought by the lessor of the plaintiff, who claimed as tenant by elegit, to recover several messuages and twenty-five acres of land, called Rhosfarm, and also known by the name of Penyrorsedd Farm. The sheriff's return to the elegit described the premises as a dwelling-house and farm commonly called or known by the name of Penyrorsedd Farm, containing by estimation nineteen acres:—Held, that the premises sought to be recovered were sufficiently described; that it was unnecessary to set them out by metes and bounds; and that under this description the lessor of the plaintiff might recover the twenty-five acres. *Doe d. Roberts v. Parry*, 14 Law J., Ex. 20.

*Verdict in ejectment may be distributive.]* The plea of not guilty, in ejectment, is distributable, and the defendant is entitled to a verdict

as to any part of the premises claimed in the action to which the lessor of the plaintiff fails to prove a title. *Doe d. Bowman v. Lewis*, 13 Mee. & W. 241; 2 Dowl. & L. 667.

In the judgment in this case per Parke, B., it is stated that in applying the rule H. T. 2 Will. 4, No. 74, the plea of not guilty has been held to raise a separate issue on each count of the declaration to which it is pleaded. *Cox v. Thomason*, 2 C. & J. 498; and to each part of a divisible count in an action on the case. *Prudhomme v. Fraser*, 4 N. & M. 512; so a plea of non-assumpsit to several counts was held to raise an issue on each, in *Knight v. Brown*, 1 Dowl. 730: Precisely the same reason applies to an action of ejectment; and if the defendant succeeds as to part, and it is material to him, with a view to costs, to have a verdict found for him as to that part, he has a right to have it so found, and have his costs taxed on that verdict.

Where the declaration in ejectment containing only one count and one demise, claimed several messuages, the jury found a verdict of guilty as to some and not guilty as to another:—The court held, that pursuant to 1 Reg. Gen. H. T. 2 Will. 4, No. 74, the defendant was entitled to his costs as to the messuage with respect to which the plaintiff had failed, and to have them set off against those of the lessor of the plaintiff. *Doe d. Errington v. Errington*, 4 Dowl. 602.

*Verdict in ejectment for several defendants joined in consent rule and against other defendants by default—costs.]* Ejectment for various premises against twelve defendants, who entered into a joint consent rule to defend for a part, and admitted a joint possession. Before the trial, by an order of the judge at Nisi Prius, two of the defendants were allowed to withdraw their pleas, and to suffer judgment by default, and their names were struck out of the record. The trial proceeded against the other defendants, who proved a title to their own premises, but not to those of the other two:—Held, that the lessor of the plaintiff was entitled to a general verdict and the general costs of the cause; but the court restrained him from taking out a writ of possession against the ten, and directed that they should have the costs of defending their possession. *Doe d. Bishton v. Hughes*, 2 C. M. & R. 281; 4 Law J., Ex. 321.

*Second action in ejectment for the same premises—costs.]* In a second action of ejectment brought for the same premises, the court will stay proceedings till the costs of the former are paid, although the former action was discontinued before consent rule or plea. *Doe d. Langdon v. Langdon*, 5 B. & Ad. 864; 2 N. & M. 849.

A having brought an ejectment, had judgment of nonsuit against him; afterwards he was discharged under the Insolvent Debtors Act, the costs of the ejectment being inserted as a debt in his schedule. The assignee of his estate having brought a second ejectment upon the insolvent's original title, the court stayed the proceedings in it until the costs of the first were paid. *Doe d. Standish v. Roe*, 5 B. & Ad. 878; 2 N. & M. 468.

A notice of trial in a second action of ejectment, served at a much earlier period than was necessary, is no objection to an application for a rule to stay proceedings until the costs of a former ejectment and

of an action for mesne profits have been paid. Neither is an irregularity in the service of the declaration in the former action.

Such a rule will not be enlarged until the trial of the second ejectment, in order to set off the costs of the lessor of the plaintiff, if successful, against the former costs. *Doe d. Maslin v. Packer*, 2 C. & M. 457; 4 Tyrw. 144; 3 Law J., Ex. 148.

ERROR—*Writ of.*

*Transcribing the record—on writ of error.]* The plaintiff's and defendant's names stand as in the original action, until the transcript of the record is carried over and filed. *Smith v. Bail*, 3 M. & P. 242.

*Assignment of error.]* There cannot be an assignment of errors in fact and law. *Rex v. Carlisle*, 2 B. & Ad. 362.

On a bad assignment of error in fact, the court will give judgment on an error in law, although no error in law be assigned. *Castledine v. Munday*, 4 B. & Ad. 90.

*Joinder in error.]* Counsel's signature is not required to the common joinder in error. *Grant v. Smith*, 5 Dowl. 107; and *Archbold v. Smith*, 1 Mee. & W. 740; 1 T. & G. 949.

*Affidavits in error.]* Affidavits used in a court of error must be entitled in that court, and not in the court below. *Gandell v. Rogier*, 4 B. & C. 862; 6 D. & R. 259.

*Amendment of record in error.]* The court of error ought not to amend the record of the court below. *Salter v. Slade*, 3 N. & M. 717; 1 Ad. & E. 608.

Unless the amendment be to make it conformable to the facts. *France v. Parry*, 1 Ad. & E. 615.

The Exchequer Chamber will only amend for misprision of the clerk. *Green v. Miller*, 2 B. & Ad. 781.

The court of error will not examine the propriety of amendments made by the court below. *Mellish v. Richardson*, 9 Bing. 125.

The court cannot, without the consent of parties, strike out issues of fact, in order to enable them to proceed on issues in law. *Carden v. General Cemetery Company*, 7 Scott, 348; 7 Dowl. 425; and *Beckham v. Knight*, 7 Dowl. 409.

*Taxation of costs in error.]* An application to review taxation of costs in error must be to the court of error. *Francis v. Doe*, 5 Mee. & W. 272; 7 Dowl. 523.

*Writ of error coram nobis—error in fact—issue joined.]* Where issue in fact is joined upon a writ of error coram nobis, and notice of trial is given by the plaintiff in error, and not countermanded, the defendant in error may have a rule absolute in the first instance for the costs of the day for not proceeding to trial pursuant to notice. *Greville v. Chapman*, 15 Law J., Q. B. 41.

*Proceedings on which a writ of error will not lie.]* On a feigned

issue, to try the existence of a custom in a manor, the jury had found for the plaintiff, subject to the opinion of the court, which also gave judgment in his favour, whereupon the defendant brought error in the Exchequer Chamber, on the ground that the customs stated in the declaration were not legal; but—The court quashed the writ, on the ground that error did not lie on a feigned issue. *Snook v. Mattocks*, 5 Ad. & E. 239; and *King v. Simmonds and another*, 14 Law J., Q. B. 248.

In cases where execution is allowed to issue notwithstanding a writ of error, there must be satisfactory evidence that the writ of error is brought for delay; but inasmuch as a writ of error, brought on a nonsuit, leaves no colour for denying the imputation for delay, the courts have required that, on a rule for setting aside execution, there shall be an affidavit of some specific error; and the general assertion of the plaintiff's attorney to that effect is not sufficient. *Evans v. Swete*, 2 Bing. 326.

In an action for penalties, after verdict by consent for one penalty only, a writ of error will not lie. *Apothecaries' Company v. Harrison*, 4 P. & D. 292.

No writ of error lies after an agreement to abide by a decision on demurrer. *Brown v. Lord Granville*, 4 M. & Sc. 333; 2 Dowl. 796.

It is no ground of error coram nobis, that the writs of venire facias and distingas juratores are returned with only one panel annexed to both. *Green v. Smith*, 5 Dowl. 174; and *Archbold v. Smith*, 1 Mee. & W. 740; 1 T. & G. 949.

It is no ground of error that the record states with respect to immaterial issues, the jury were discharged as to them, without showing consent of the parties. *Powell v. Sonnett*, 3 Bing. 381; 1 Dowl. 56; 1 Bli. N. S. 545.

The neglect to assess damages for the plaintiff on the demurrer was not ground of error, where the first issue was found for the defendants. *Gregory v. Duke of Brunswick and another*, 16 Law J., C. P. 34.

*Allowance of writ of error, effect of.]* A defendant cannot be charged in execution after notice of allowance of a writ of error. *Marston v. Halls*, 5 Dowl. 292; 2 Mee. & W. 60; and *Mailand v. Mazeredo*, 6 M. & S. 139.

*Notice of allowance of writ of error—title of cause.]* Where the notice of allowance of a writ of error and assignment of errors were not entitled in the original cause of "H. S. & H. M. H. against R. F. G., Esq., commonly called the Hon. R. F. G.;" but in "S. & another," against the Hon. R. F. G.:"—Held, on motion to set aside the allowance and assignment of errors for irregularity, that the variance was immaterial. *Sparding and another v. Greville*, 2 Dowl. & L. 721, Q. B.

*Bail in error may be dispensed with where the court directs the point to be raised.]* Where a writ of error has been brought by a defendant upon a point raised under the direction of the court upon a special verdict, and with a bona fide view of obtaining the decision of the court upon a point of law, the court will stay execution, without requiring bail in error, such case being irrespective of the stat. 6 Geo

4, c. 96. And quære if under that statute the court may stay proceedings without bail in all cases. *Williams and another v. Downman*, 13 Law J., Q. B. 319.

*Writ of error—judgment of non pros.—entry of.]* If the plaintiff in error fail to assign errors in proper time, and the defendant in error sign judgment of non pros., the latter is entitled to enter the proceedings and judgment of non pros. upon the roll, in the court below. No entry of a remittitur is necessary.

The rule applies to a judgment upon an indictment as well as to others. *The Queen v. King and others*, 14 Law J., Q. B. 86.

*Writ of error—reversal of judgment of imprisonment.]* Where a judgment of imprisonment was reversed upon error brought, the court of Queen's Bench pronounced a rule, ordering that the plaintiff in error should be discharged out of the custody of the keeper of the Queen's prison, where he had been kept by virtue of his commitment. *Holt v. The Queen (in error)*, 14 Law J., Q. B. 98.

On the reversal by a court of error of a judgment of imprisonment pronounced by the court of Queen's Bench, the court declined to make an order that the plaintiff in error should be discharged out of custody, as the application ought to be made to the court below. *King and another v. The Queen (in error)*, 14 Law J., Q. B. 302.

*Error on a quo warranto—costs.]* Where upon error on a quo warranto the judgment in favour of the relator is affirmed, he is not entitled to costs in error. *Rowley v. The Queen (in error)*, 14 Law J., Q. B. 240.

*Writ of error frivolous—execution allowed to issue.]* The common count for interest is good; and a writ of error assigning for causes that no promise to pay interest could be implied by law from the forbearance of money at the defendant's request, was held to be frivolous, and execution was allowed to issue notwithstanding. *Nordenstrom v. Pitt and others*, 14 Law J., Ex. 150.

*Error books, delivery of.]* If a plaintiff in error does not deliver his paper-books in due time, and the defendant in error delivers them all, the latter is entitled to judgment. *Best v. Prior*, 2 Dowl. 189.

## EXECUTION.

*Execution cannot issue against a defendant discharged under Insolvent Debtors Act.]* Where one of several defendants, having been arrested on a ca. sa. has been discharged under the Insolvent Debtors Act, his goods cannot be afterwards seized under a fi. fa. issued against him and the other defendants. *Raynes v. Jones*, 9 Mee. & W. 104.

*Execution may issue against a public registered officer without a sci. fa.]* A defendant having been sued as the public registered officer of a joint-stock banking company, and taken in execution on

the judgment :—Held, that execution might be issued without a scire facias, and that he was not entitled to his discharge. *Harwood v. Law, P. O., &c.*, 10 Law J., Ex. 30.

*Execution, how obtained against members of a company—the proceedings in the name of public officer.]* A local and personal act of parliament enacted, that every judgment obtained against a nominal party might be executed against the person and estate of every individual shareholder, as if he had been by name a party to such proceedings, provided that no such execution against any person being or having ceased to be a shareholder should be issued without leave of the court, and after notice of such motion to the person sought to be charged :—Held, that the proper mode of proceeding against a shareholder upon a judgment obtained against a nominal party was not by motion for leave to issue execution against such shareholder, but by scire facias. *Clowes v. Brettell*, 12 Law J., Ex. 8.

*Execution on judge's order, how obtained.]* The Imprisonment for Debt Act, 1 & 2 Vic. c. 110, s. 18, which gives the rules of court the effect of judgments in the superior courts of common law, does not enable a party, even with leave of the court, to sue out execution upon a judge's order, before making such order a rule of court. *Wallis v. Sheffield*, 9 Law J., Ex. 2.

*Execution against a bed-ridden debtor.]* Where a defendant had been arrested on a ca. sa., but was too ill to be removed from his house without danger to his life, the court enlarged the time for returning the writ, but could not afford the sheriff any relief against the extra costs of keeping up the caption. *Jones v. Robinson*, 11 Mee. & W. 758 ; 12 Law J., Ex. 415.

*Execution against the dead body of defendant.]* Where, upon request by the executors, a gaoler refused to deliver up for interment the body of a debtor in execution, who had died in the gaol, until the amount of certain detainers was paid, the court directed a mandamus to issue, peremptory in the first instance, commanding him to deliver it up. *Ex parte the Lord of the Manor of Wakefield*, 11 Law J., Q. B. 41.

*Execution on a judgment in the Common Pleas at Lancaster.]* To obtain execution in the courts at Westminster, on a judgment in the Common Pleas at Lancaster, the affidavit must show that the party has removed his goods out of that jurisdiction. *Duckwork v. Fogg*, 2 C. M. & R. 736 ; 4 Dowl. 396 ; and *Lord v. Cross*, 3 Dowl. 4 ; 2 Ad. & E. 81.

On an application under the stat. 4 & 5 Will. 4, c. 62, s. 31, for leave to issue execution on a judgment in the court of Common Pleas at Lancaster, the affidavit must state distinctly that the defendant was a resident within the jurisdiction of that court at the time of the judgment or of action brought, and then had goods and chattels there, which he has since removed out of the jurisdiction. It is not sufficient to state that

he is not now a resident in the county of Lancaster, and has not any goods and chattels within the jurisdiction; or that he is not now a resident there, and has removed all his goods and chattels out of the jurisdiction since the judgment. The affidavit must be entitled in the superior court. *Wigden v. Birt*, 9 Mee. & W. 50; 11 Law J., Ex. S.

*Speedy execution by judge's certificate, when to issue.]* A judge's certificate (under 1 Will. 4, c. 7, s. 2) that execution should issue "forthwith," means in the ordinary course of the office; and the court refused to allow the plaintiff to sign judgment before the expiration of four days after the trial. The proper course would have been to apply to the judge who tried the cause. *Snooks v. Smith*, 7 Man. & G. 528.

*Execution under 8 & 9 Vic. c. 127—form of warrant.]* A warrant of commitment under 8 & 9 Vic. c. 127, issued from the Palace Court, after reciting that defendant "was and now is indebted to J. H. D. in the sum of 4*l.* 10*s.*, and no more, besides costs of suit amounting to 5*l.* 5*s.* by virtue of a judgment" in the Exchequer, &c., ordered that defendant "shall be committed for the term of twenty days to the common gaol, wherein debtors, under judgment and in execution of the superior courts of justice, may be confined within the county of Surrey." The warrant was directed to H. H., an officer of the said (Palace) court, and to the keeper of the debtors' prison above mentioned for the county of Surrey, and defendant was imprisoned under it in Horsemonger-lane gaol, being the debtors' county gaol for Surrey:—Held, first, that the warrant was not bad, in omitting to state that the sum due was not a balance of an account originally exceeding 20*l.*, inasmuch as defendant might be imprisoned in respect of a judgment debt under 20*l.*, although originally exceeding that amount. Held, secondly, that the twenty days' imprisonment began to run from the day of defendant being lodged in gaol. Held, thirdly, that the place of imprisonment was sufficiently stated in the warrant. Held, lastly, that the warrant was rightly directed, the execution of the process not being confined by 8 & 9 Vic. c. 127, to the high bailiff of Westminster. *Ex parte Foulkes*, 15 Law J., Ex. 300.

*Costs of execution.]* A plaintiff who levies costs and expenses of an execution, in addition to the sum recovered by the judgment under 43 Geo. 3, c. 46, s. 5, must at his peril take care to keep them within such a reasonable sum as will be afterwards allowed on taxation, otherwise the court, on motion, will order the excess to be restored, with costs to be paid by the plaintiff. *Benwell v. Oakley*, 2 Taun., 174; and *Rumsey v. Tufnell*, 2 Bing. 255.

*Defendant not entitled to costs of execution on judgment of non pros.]* The statute 43 Geo. 3, c. 46, s. 5, does not enable a defendant to levy the costs of an execution for his costs of an action. *Baker v. Sydee*, 7 Taun. 178.

*Execution, defendant discharged from, on death of plaintiff, if no will proved nor administration.]* Where a defendant is in execution, and the plaintiff dies, a rule may be made absolute in the first instance for his discharge, on production of an affidavit by the next of kin,

that it is not his intention to prove any will, or take out letters of administration. *Gore v. Wright*, 1 Dowl. N. S., 864, B. C.—Coleridge, J.

*Execution cannot be levied on goods the subject of lien.]* At common law the sheriff can seize only those things which he can sell; and therefore a lien, which is a mere personal right, and cannot be made the subject-matter of a sale, cannot be taken in execution under a fieri facias. *Legg v. Evans*, 6 Mee. & W. 36; 9 Law J., Ex. 102; 8 Dowl. 177.

*Charging a defendant in execution.]* Where the judgment is more than a year and a day old, the plaintiff cannot charge the defendant in execution by habeas corpus without first reviving the judgment by sci. fa. *Smith v. Sandys*, 5 N. & M. 59.

The rule charging a defendant in execution need not be lodged at the prison on the same day a defendant is charged; it is sufficient if lodged within a reasonable time. *Blandy v. Webb*, 3 Tyrw. 235, Ex.

A defendant arrested on a judge's order, under 1 & 2 Vic. c. 110, s. 3, is supersedable, unless the plaintiff proceed to execution within two terms inclusive after judgment, conformable to R. H. 2 Will. 4, No. 85. *Walter v. De Richmont*, 6 Q. B. 544.

And where judgment in debt is signed for want of a plea:—Held, that the time ran from such signing, although the costs were not taxed. *Ib.*

*Execution for costs against a married woman, a co-plaintiff.]* A married woman, where co-plaintiff with her husband, is liable to be taken in execution for costs, under stat. 23 Hen. 8, c. 15, upon nonsuit or verdict for the defendant.

And although she may be entitled to her discharge by reason of her having no separate property, yet the writ of execution pursuing the judgment is not void or illegal, and an action on the case for issuing it as without reasonable or probable cause is not maintainable. *Newton v. Rowe and another*, 16 Law J., Q. B. 146.

### INFERIOR COURTS.

*Middlesex County Court Act, to what cases applicable.]* The Middlesex County Court Act, 23 Geo. 2. c. 33, does not apply to cases where the cause of action arises within the city and liberty of Westminster. *Todd v. Emley*, 11 Mee. & W. 610.

And under this act the defendant must reside, and the cause of action accrue, within the county. *Baily v. Chitty*, 2 Mee. & W. 28; 5 Dowl. 307.

It is not necessary, in order to entitle a defendant to enter a suggestion for costs under the Middlesex Court of Requests Act, that the plaintiff should have been resident within the jurisdiction. *Pritchard v. McGill*, 2 M. & W. 380.

A suggestion for double costs not allowed after judgment by default and writ of inquiry. *Stratton v. Whitwell*, 1 M. & R. 562.

*A suit pending in an inferior court cannot be pleaded in a superior court.]* The defendant cannot plead a former suit pending in the

Mayor's Court in Liverpool, to an action in the superior courts. *Laughton v. Taylor*, 8 Dowl. 776; 6 Mee. & W. 695.

*Appearance necessary in an inferior court before judgment.]* A custom in an inferior court to summon and declare at the same time, and proceed to judgment without an appearance, is bad. *Williams v. Bagot*, 3 B. & C. 772.

*A summons must issue to found proceedings in inferior court.]* Proceedings in an inferior court are contrary to law, if no previous summons issue to found them. *Bruce v. Wait*, 1 Scott N. S. 181; 1 M. & G. 1.

*Form of declaration to give jurisdiction.]* The declaration must show the cause of action to have arisen within the jurisdiction of the court. *Brisco v. Stevens*, 2 Bing. 213.

*A county court has no jurisdiction in a question of freehold.]* If a plea asserting a title to the freehold be pleaded in the county court, the court is immediately ousted of its jurisdiction, and should not proceed. Therefore, where the defendant in replevin made cognizance for the taking of cattle, that the place in which they were taken was the soil and freehold of the corporation of the city of York, and that he, as their bailiff, took them damage feasant, to which the plaintiff pleaded that the defendant was not such bailiff, and did not take them as such bailiff, on which issue was joined:—After verdict and judgment for the plaintiff in the county court, it was held, that such judgment was erroneous. *Tinnisswood v. Pattison*, 15 Law J., C. P. 231; 10 Jur. 572.

*Defendant's claim to costs under Court of Requests Act.]* Under a Court of Requests Act, it is no objection to the defendant's claim for costs that the plaintiff was unaware that the defendant resided within the jurisdiction. *Crowder v. Bell*, 2 Dowl. 508, B. C.

But the party must clearly bring himself within the jurisdiction of the inferior court. *Newton v. Peacock*, 1 Dowl. 677, Ex.

The Court of Requests Acts do not apply after payment of money into court. *Tarrant v. Morgan*, 2 C. M. & R. 352.

Nor where the claim is reduced by set-off. *Jenkinson v. Morton*, 1 Mee. & W. 300.

When the debt is reduced below 40s. by part payment, a suggestion under the Middlesex Act allowed. *Nightingale v. Barnard*, 4 Bing. 169; and *Chadwick v. Bunning*, 5 B. & C. 534; 8 D. & R. 155.

*Where the sum sought to be recovered is the balance of an account.]* A party suing in a superior court for the balance of an account, the original debt exceeding 5*l.*, but which has been reduced to 30*s.*, is not liable to costs under the Tower Hamlets Court of Requests Act. *Green v. Bolton*, 4 Bing. N. S., 308; 6 Dowl. 434.

It seems that an action may be brought for the balance of an account which originally exceeded 5*l.*, where the aggregate of the items exceeds that sum, although at no time such sum was due. *Moreau v. Hicks*, 4 N. & M. 563.

*A local act of parliament for an inferior court may also be a public act.]* The Sandwich Court of Requests Act (47 Geo. 3, c. 35), which contains a clause declaring that it shall be deemed a public act, enables the commissioners to take cognizance of debts, wheresoever contracted, if the defendant shall be within the jurisdiction of the court:—Held, that this was a public, local, and personal act, within the 5 & 6 Vic. c. 97. *Coch v. Gent and others*, 1 Dowl. & L. 413 Ex.

*Inferior court—removal of cause by habeas corpus—procedendo.]* On the 20th January, 1845, a cause was removed by defendant from the Lord Mayor's Court, by habeas corpus. Plaintiff did not rule the defendant to put in bail or take any other proceeding until the 29th August, 1846, when a judge's order was obtained, that unless defendant put in bail within four days, a procedendo would issue. No bail was put in, and on 30th May, a writ of procedendo issued. Upon application on behalf of the bail to set aside the writ for irregularity, on the ground that plaintiff was out of court for not declaring in this court before the end of a year from the return of the habeas corpus:—Held, that the writ of procedendo had issued regularly. *Blanchard v. De la Crouée*, 11 Jur. 283; 16 Law J., Q. B. 181.

*Cause removed from inferior court—declaration.]* Where a cause, which has been commenced in an inferior court, is removed to a superior one, it is not necessary that it should be alleged in the declaration, that the cause of action arose within the jurisdiction of the inferior court. *Powell v. Ancell*, 10 Law J., C. P. 317.

*Entering a suggestion under a local court act notwithstanding the stat. 9 & 10 Vic. c. 95.]* The repealing clause of the statute 9 & 10 Vic. c. 95, is not an absolute clause of repeal, but only repeals such acts as relate to the establishment of courts for the recovery of small debts. Therefore, since the passing of that act, a suggestion may be entered to deprive a plaintiff of costs, under the Isle of Wight Court of Requests Act, (46 Geo. 3, c. 66,) if the defendant at the time of the commencement of that action could have been sued in that court.

Such suggestion may be entered, although judgment in the action was suffered by default.

Execution on such judgment was executed on the 3rd of May; the application to enter the suggestion was made on the 27th:—Held, not too late. *Warber and others v. Reed*, 11 Jur. 522, Q. B.

*Warrant of commitment under Small Debts Act, 8 & 9 Vic. c. 127.]* A warrant of commitment by the judge of the Sheriffs' Court, London, under stat. 8 & 9 Vic. c. 27, s. 1, recited that T. K., “of Fleet Lane, in the city of London,” being indebted to W. T., and “then being at Fleet Lane in the city aforesaid,” was duly summoned, &c., and having appeared, &c., and it thereupon appearing that T. K. had the means of paying the debt hereinafter mentioned, an order was made to pay by instalments, and that default had been made in payment; it then ordered that the said T. K., should be taken into custody and conveyed to the debtors' prison in L., “being the city in which the

said T. K. had been resident," and there detained for forty days:— Held, first, that it was not necessary that the warrant should show a summons of T. K. before it was issued—Patteson and Coleridge, JJ., dissenting;

Secondly, that it sufficiently appeared that T. K. was residing within the jurisdiction of the judge at the time of the issuing of the warrant—Patteson, J. dissenting. And by Coleridge and Erle, JJ.—Sec. 1 of stat. 8 & 9 Vic. c. 127, empowers the judge to issue his warrant for the commitment of the debtor, though not then residing within his jurisdiction. *Ex parte Kinning*, 11 Jur. 451.

In the same case an application was made to the court of Common Pleas on habeas corpus, for the discharge of the defendant, and that court unanimously held, that after an order for payment of a debt by instalments under the Small Debts Act, 8 & 9 Vic. c. 127, s. 1, and default made in payment of such instalments, an order for commitment for such default is bad, without a previous summons or notice to the debtor, as the making of the order for commitment is a judicial act, in the exercise of which the judge has a discretionary power. The prisoner was discharged. *Ib.* 11 Jur. 456.

*Jurisdiction of superior and inferior courts.]* The old rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of the superior court, but that which specially appears to be so; nothing is intended to be within the jurisdiction of an inferior court but that which is expressly alleged;—the courts of counties palatine, being superior, the record in these courts need not state the cause of action to have arisen within the jurisdiction. *Peacock v. Bell*, 1 Saunders, 75.

*Process issued by superior and inferior courts.]* In cases of special authority given by statute to justices or others acting out of the ordinary course of the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, convictions or inquisitions, ought according to the course of decisions to show their authority on the face of them by direct averment or reasonable intendment; not so the process of superior courts, acting by the authority of the common law. Many of the writs issued by superior courts do, upon the face of them, recite the cause of their issuing, and show their legality; writs of execution for instance. Others, however, do not, and though unquestionably valid are framed in a form which, if they had proceeded from magistrates, or persons having a special jurisdiction unknown to the common law, would have been clearly insufficient and would have rendered them altogether void. *Gosset v. Howard*, Ex. Cham. in Error, H. T. 1847.

Unless it appears on the face of the proceedings of an inferior court that they had jurisdiction in the subject-matter before them, no intendment is to be made in favour of the correctness of those proceedings. Per Tindal, C. J., *Dempster and another v. Purnell*, 11 Law J., C. P. 33.

*Suggestion under County Court Act traversable.]* A suggestion under the Middlesex County Court Act, (23 Geo. 2, c. 33, s. 19,) to deprive the plaintiff of costs, and allow the defendant double costs, on the

ground that the plaintiff had recovered less than 40s. damages, and that the defendant was an inhabitant of and resident in Middlesex, and liable to be summoned to the county court, is traversable; and that notwithstanding the plaintiff has previously shown cause against a rule to enter the suggestion.

Where the right of a party to any costs depends upon a fact, the determination of which is not by the statute law vested in the court, and which must be stated in the record to justify the award of costs contrary to the usual course, the fact is traversable, and may be tried by a jury. *Watson v. Quilter*, 11 Mee. & W. 760; 1 Dowl. & L. 244, Ex.

An affidavit in support of an application for double costs, under 23 Geo. 2, c. 33, s. 19, (the Middlesex County Court Act), must state the defendant liable to be summoned to the county court. *Unwin v. King*, 2 Dowl. 492, B. C.

*Seal of an inferior court admitted.]* If a statute creating a court gives a seal, other courts will take judicial notice of the seal. *Doe v. Edwards*, 1 P. & D. 408.

*The Uniformity Act not applicable to pleadings in inferior courts.]* The Uniformity Act does not extend to inferior courts; and therefore the declaration may be according to the old forms. *Doe v. Grant*, 6 N. & M. 70.

*Inferior court—exclusive audience of barristers.]* The court of Queen's Bench will not question an order made by an inferior court granting exclusive audience to barristers. *The Queen v. The Justices of Denbighshire*, 15 Law J., Q. B. 335.

*Costs in a cause removed from the Palace Court.]* In an action commenced in the Palace Court, the court into which the cause is removed has no jurisdiction as to costs under the 43 Geo. 3, c. 46. *Handley v. Levi*, 8 B. & C. 637.

*A judgment in the Palace Court may be moved by certiorari.]* On a motion for a certiorari, the court granted a rule to remove a judgment from the Palace Court, to enable the plaintiff to sue out execution for the residue of the debt, part having been levied by process of the court below. *Knowles v. Lynch*, 4 Tyrw. 477.

## INSPECTION OF DOCUMENTS.

*Inspection of manor court rolls.]* If an application to inspect the court rolls of a manor is made when no cause is pending the rule is nisi in the first instance. *Ex parte Best*, 3 Dowl. 38.

*Inspection of documents.]* In an action founded on a contract in writing not under seal, the court will not order the document to be deposited in the hands of the master, although the defendant swears to his belief that it is a forgery, but will only allow the defendant and his witnesses to inspect the instrument.

An application to inspect such a document should be made to a

judge at chambers, and not to the full court, and should be preceded by a demand and refusal. *Thomas v. Dunn*, 1 Dowl. & L. 535, C. P.

Where after the breaking off the intended match between the plaintiff and defendant, and an agreement to return all letters, which had been complied with by the defendant, but not by the plaintiff, and she afterwards commenced an action for the breach of promise of marriage, the court refused an application for the defendant's inspecting some of the letters alleged to contain a release from the plaintiff of the promise. The court will only grant an inspection where the documents are set out in the declaration, or where one party holds them as trustee or agent for the other. *Goodliff v. Fuller*, 2 Dowl. & L. 661; 14 Mee. & W. 4.

*Inspection of transfer books of the Bank of England.]* F. having brought an action against the Bank of England for refusing to pay the dividends upon stock which had stood in her name, in the books of the Bank of England, and their refusal being grounded on an alleged transfer of that stock from her name, the court made a rule absolute for allowing her to inspect the entry in the transfer book of the bank which transferred that stock. *Foster v. Bank of England*, 15 Law J., Q. B. 212; 10 Jur. 372.

*Inspection of documents—forgery alleged—refused before plea.]* A. brought an action against B. for slander, for asserting that he had forged an I. O. U., then in A.'s possession. On an application by B. to the court for permission to inspect the said I. O. U., on the ground that B. had reason to believe that it was in reality a forgery, and that he could not safely plead without inspecting it, the court refused the rule. *Day v. Tuckett*, 1 B. C. Rep. 203.—Wightman, J.

*Inspection by plaintiff of documents in the possession of the defendant's attorney.]* The plaintiff, an allottee of railway shares, brought an action for money had and received against the defendant, a director of the company, to recover his deposit. The subscriber's agreement and parliamentary contract, signed by the plaintiff and the defendant, were in possession of the attorneys for the railway company. The court ordered the defendant to give the plaintiff an inspection and copy of the documents, upon an affidavit, stating that they were necessary for the purpose of framing the plaintiff's case. *Steadman v. Arden*, 15 Law J., Ex. 310; 10 Jur. 553.

*Inspection of documents mentioned in affidavit not allowed.]* The court will not allow a party to take a copy of, or inspect a deed which has been referred to in an affidavit, on which a rule for a new trial has been obtained for the purpose of enabling him to show cause against the rule, as in case of surprise or difficulty a further day be given him. *Wood v. Morewood*, 10 Law J., C. P. 53.

### INTERPLEADER.

*Application of the Interpleader Act.]* The Interpleader Act does not apply to adverse claims set up in respect of a sum of money due upon a contract for work and labour. *Turner and another, assignees, &c. v. The Mayor, &c. of Kendal*, 2 Dowl. & L. 197, Ex.

## INTERPLEADER.

The first section of the Interpleader Act does not apply to the case of a party sued by one person for the price of goods, and by another for the goods themselves. *Slaney v. Sidney and others*, 3 Dowl. & L. 250; 14 Mee. & W. 800; 15 Law J., Ex. 72.

The statute only applies where the cross claims are on the same subject matter. *Farr v. Ward*, 2 Mee. & W. 844.

A party disclaiming all interest beyond a lien on the chattel may obtain the interference of the court. *Cotter v. Bank of England*, 2 Dowl. 728; 3 M. & Sc. 180.

A party cannot obtain relief under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 1, where he has incurred a personal liability to either of the contending parties.

Semble, a foreigner residing abroad, cannot be compelled to come in under the Interpleader Act. *Patorni v. Campbell*, 12 Mee. & W. 277; 1 Dowl. & L. 397.

The court cannot give relief under the Interpleader Act to stakeholders who are only threatened with proceedings; an action must be brought, and the plaintiff declare before the court can interfere. *Parke v. Linnett*, 2 Dowl. 562.

Conflicting claims for a reward offered are not within the act. *Gay v. Pitman*, 5 Scott, 795.

A contested claim to a reward advertised for the apprehension of a felon, cannot be made the subject of a motion under the Interpleader Act. *Grant v. Fry*, 4 Dowl. 135; and *Allis v. Lee*, 5 Law J., C. P. 83.

The court will not grant an interpleader rule where actions have been brought against the holder of a stake, deposited with him to abide the event of an illegal horse race. *Applegarth v. Colley*, 11 Law J., Ex. 350.

*Construction of the Interpleader Act.]* The act is not compulsory upon the court, but discretionary only. *Belcher v. Maberley*, 2 M. & Sc. 189.

*An affidavit is necessary to support a claim.]* The claimant must appear and state the nature of his claim by affidavit. *Poweler v. Lock*, 4 N. & M. 852; 4 Ad. & E. 415.

But the execution creditor is entitled to be heard without an affidavit. *Angus v. Wootton*, 3 Mee. & W. 310.

*Application of the Interpleader Act in trespass against a sheriff.]* Where a sheriff under a fi. fa. against A. has entered the dwelling house of B. he cannot avail himself of the provisions of the Interpleader Act, in order to stay proceedings in an action of trespass brought against him by B., although the claim as to the goods taken at the time had already been the subject of, and determined by, an interpleader rule, to which B. was a party. *Hollier v. Laurie and another*, 10 Jur. 860; 15 Law J., C. P. 294.

*Application by the sheriff under the Interpleader Act.]* A sheriff who has delivered over goods taken in execution to a claimant, is not entitled to relief under the Interpleader Act. *Kirk v. Almond*, 2 Law J., Ex. 13.

Where the sheriff, after notice of claim, delivers over part of the goods taken in execution to the claimant, he is not entitled to the interference of the court under the Interpleader Act. *Braine v. Hunt*, 2 C. & M. 418; 3 Law J., Ex. 85; 4 Tyrw. 243.

A sheriff who, under a fi. fa., seizes goods which have been distrained for rent, is not entitled to relief under the Interpleader Act, or to an indemnity from the execution creditor. *Haythorn v. Bush*, 2 C. & M. 689; 3 Law J., Ex. 210; 2 Dowl. 641.

The sheriff must be prepared in the first instance with sufficient affidavits, and will not be allowed to file a supplemental affidavit, accounting for delay:—Semble, that he must deny collusion. *Cook v. Allen*, 1 C. & M. 542; 2 Law J., Ex. 199; 2 Dowl. 546.

The sheriff need not wait for proceedings to be taken against him before he applies to the court for relief. *Green v. Brown*, 3 Dowl. 337.

Where application is made by the sheriff for relief under the Interpleader Act, the court will not try the merits of the respective claims upon affidavit. *Bramidge v. Adshead*, 2 Dowl. 59.

A sheriff, who has taken goods in execution, will be allowed to withdraw from possession, if the execution creditor should not appear upon a rule under the Interpleader Act; but the court will not direct either the execution creditor or the claimant to pay the costs of retaining possession. *Field v. Cope*, 2 C. & J. 480; 1 Law J., Ex. 175; 2 Tyrw. 468.

Where a sheriff had taken goods in execution, and on an adverse claim being made to them, obtained a rule, to which the claimant did not appear, the court barred the claim, and ordered him to pay the execution creditor his costs of showing cause against the rule, unless cause was shown in six days from the service of such order. *Perkius v. Benton*, 3 Tyrw. 51; and *Towgood and others v. Morgan*, 3 Tyrw. 52; 2 Dowl. 108.

Where an application is made to the court by the sheriff under the Interpleader Act, the court cannot try the right of the different claimants upon affidavit, but must direct an issue. The circumstances of the goods seized being in the possession of a stranger, and not of the defendant against whom the execution issued, does not prevent the sheriff applying under the act. *Allen v. Gibbon*, 2 Dowl. 292.

Where the sheriff obtains a rule for relief under the Interpleader Act, the claimants may appear without taking office copies of the affidavits on which the rule was obtained. *Mason v. Redshaw*, 2 Dowl. 595.

One court cannot relieve the sheriff under the Interpleader Act with respect to process issued out of another court. *Wills v. Hopkins*, 2 Dowl. 151.

Where a sheriff seizes under one fi. fa., and the question is whether that writ ought to have precedence of another, the court will not grant the sheriff relief under the 1 & 2 Will. 4, c. 58, s. 6. *Day v. Waldock*, 1 Dowl. 523.

Where a claimant, after an application under the Interpleader Act, abandons his claim after an issue directed, the sheriff is entitled to his costs from the time of directing the issue, and of the application of those costs. *Scales v. Sargeson*, 4 Dowl. 231.

Where a claim is made by one on behalf of another to goods seized by the sheriff in execution, and upon a rule being obtained under the

## INTERPLEADER.

Interpleader Act, neither party appears to show cause, the plaintiff is not entitled to receive his costs from the sheriff; but the sheriff and plaintiff are both entitled to their costs from the claimant or his agent upon a rule to show cause. *Philby v. Ikey*, 2 Dowl. 222.

Where the sheriff applies to the court for relief, and no blame appears to attach either to the execution creditor, the claimant, or the sheriff, each party will pay his own costs. *Morland v. Chitty*, 1 Dowl. 520.

Where an issue is directed to be tried between an execution creditor, and a claimant brought before the court by the sheriff under the Interpleader Act, but the latter refuses to try, and abandons his claim, he will be liable to pay the execution creditor's costs down to the time of the claim being abandoned, and of applying to take the money paid by the sheriff out of court. *Bragg v. Hopkins*, 3 Dowl. 346.

If the under-sheriff is the execution creditor, or partner in business of the execution creditor, the sheriff is not entitled to relief under the Interpleader Act. *Ostler v. Bower*, 4 Dowl. 605.

The court will not interfere to relieve the sheriff under the Interpleader Act, where the proceeds of the levy have been paid over to the execution creditor, although the sheriff may be willing to bring a similar amount into court. *Inland v. Bushell*, 5 Dowl. 147.

Where, on an application by the sheriff, the claimant appeared, but not the execution creditor, the court ordered the sheriff to withdraw from the possession forthwith, and that he should be discharged from all proceedings by the execution creditor, in respect of the seizure. *Doble v. Cummins*, 7 Ad. & E. 580; 7 Law J., Q. B. 12; 2 N. & P. 575.

When the sheriff applies for relief under the Interpleader Act, he need not in his affidavit deny collusion with the party. *Bond v. Woodhall*, 2 C. M. & R. 601; 5 Law J., Ex. 9; 4 Dowl. 351.

The court has no power, under the Interpleader Act, to dispose summarily of the matter in dispute between the parties, who appear on the sheriff's rule, without the consent of both plaintiff and claimant. *Curlew v. Pocock*, 5 Dowl. 381.

*Where the Interpleader Act does not afford the sheriff relief.]* The sheriff having levied and sold the goods and paid over the proceeds to the judgment creditor, an interpleader rule will not be granted. *Scott v. Lewis*, 2 C. M. & R. 289; 4 Dowl. 259; and *Anderson v. Calloway*, 1 C. & M. 182; 1 Dowl. 636; and *Chalon v. Anderson*, 3 Tyrw. 237.

And if a sheriff withdraws from possession, he is not entitled to the interpleader rule. *Holten v. Guntrop*, 3 Mee. & W. 145; 6 Dowl. 130.

Where the sheriff had suffered an action to be brought, and kept possession of the goods for several months:—Held, that he had made his election, and the rule discharged with costs of all parties. *Devereux v. Johns*, 1 Dowl. 548, B. C.

A fi. fa. was issued on the 10th December; the sheriff did not apply till the last day of Hilary term:—Held, too late. *Cook v. Allen*, 1 C. & M. 542; 2 Dowl. 11.

A levy under a fi. fa. was made by the sheriff on the 16th January,

under which he seized goods, bank notes, and bills of exchange still undue; on the 11th February he made his return to the writ. On the 3rd of February notice was given to him of an act of bankruptcy committed by the execution debtor, and on 18th February a claim was made, on behalf of the assignees, to the bills of exchange still remaining in the sheriff's hands. From that day until the 29th April no step was taken by the sheriff, in consequence of negotiations entered into between the assignees and himself. An interpleader summons was taken out on the 29th April:—Held, that the sheriff, in consequence of his delay, was not entitled to relief. *Mutton and another v. Young*, 11 Jur., 414, C. P.

*Interpleader rule applied for by the sheriff, where an alleged partner claims.]* A claim made by a secret partner to goods taken in execution, alleging they are partnership property, and that, on a balance of accounts, the partner against whom the writ has issued is indebted to the co-partnership, entitles the sheriff to relief under the Interpleader Act, if the fact that the claimant is a partner be disputed by the execution creditor. And where the execution creditor refuses either to admit or deny the alleged partnership, the court will enlarge the time for the sheriff's return to the writ until he is indemnified.

Before the sheriff applies to the court for relief under the act, he ought to communicate the claim to the execution creditor, for the court will require such a communication to have been made, in order to be satisfied that there are adverse claims. *Holmes v. Mentze*, 4 Ad. & E. 127; 5 Law J., K. B. 62; 5 N. & M. 563; 4 Dowl. 300.

*Goods purchased of a bankrupt whose assignee and another party claim.]* Where the assignee of a bankrupt factor sues for goods sold by the bankrupt to the defendant, and a third party claimed the proceeds, as having been the consignor of the goods:—Held, that the defendant was entitled to the benefit of the Interpleader Act. *Johnson, assignee, v. Shaw*, 12 Law J., C. P. 112.

*Interpleader Act does not apply where the crown is a party interested.]* The court refused a rule under the Interpleader Act, applied for by a defendant, upon affidavits stating that the debt sought to be recovered in the action had been, under a writ of extent issued against the plaintiffs, returned by the jury as seized for the crown.

The provisions of the Interpleader Act do not apply to cases where the crown is a party interested. *Candy and Dean v. Maughan*, 13 Law J., C. P., 17.

*Where the claimant obtained the goods by giving an indemnity.]* If the goods be delivered up by the party obtaining the rule, on an indemnity from the claimant, the rule will be discharged with costs. *Tucker v. Morris*, 1 C. & M. 73; 1 Dowl. 639.

*An interpleader rule where the execution creditor resided in Scotland, security for costs.]* The plaintiff residing in Scotland, and having obtained judgment issued a fi. fa., under which the sheriff was in possession of the goods of the defendant, when the latter became bank-

rupt, and his assignees claimed the goods. The sheriff applied to a judge under the Interpleader Act, who ordered the assignees to take the goods; and upon paying the amount of the execution into court, an issue was directed to be tried between the assignees, plaintiffs, and the execution creditor:—Held, that the defendant in the issue must give security for costs. *Williams v. Crossling*, 16 Law J., C. P. 112.

*An interpleader order determining the rights of parties must be by consent.]* Upon an application by the sheriff, under the Interpleader Act, a judge at chambers has no power to determine the rights of the parties without their consent; and such consent should appear on the face of the order. But where, upon such an application, the judge made an order which was not stated to be by consent, but under which the parties acted, it was held to be binding, as an adjudication upon a matter submitted to the judge. *Harrison, executor v. Wright*, 2 Dowl. & L. 695, Ex.; 13 Mee. & W. 816.

*Changing the parties to an interpleader rule.]* Where a party to an interpleading rule refused to proceed, the court refused to substitute another claimant, unless the former were party to the rule for substituting the other. *Lydal v. Biddle*, 5 Dowl. 244, B. C.

*An interpleader order by consent cannot be reviewed by the court.]* Where a judge at chambers has by consent disposed of an interpleader rule in a summary way, the court has no power to review his decision. *Shortridge and others v. Young*, 1 Dowl. & L. 416, Ex.; 12 Mee. & W. 5.

*An infant claimant under an interpleader rule.]* The court has power to give a sheriff relief under the Interpleader Act, though the claimant is an infant. *Claridge v. Collins*, 7 Dowl. 698, B. C.

*After an interpleader rule nisi granted a new claimant appears.]* Where a new claim was raised after the rule nisi granted, the sheriff was allowed to make him a party to the rule. *Kirk v. Clark*, 4 Dowl. 363, Ex.

*Money paid into court under an interpleader rule.]* Where the money has been brought into court, a rule for taking it out cannot be obtained before judgment signed on the issue. *Cooper v. Lead Smelting Company*, 9 Bing. 634; 2 M. & Sc. 810; 1 Dowl. 728.

*Parties served with interpleader rule, not appearing are barred.]* The decision under an interpleader rule is final against claimants served with the rule, who do not appear and support their claims. *Ford v. Dillon*, 2 N. & M. 662; and *Lewis v. Eickey*, 2 C. & M. 321; 4 Tyrw. 157.

Where execution creditors do not appear in pursuance of a rule under this act, the court will direct their claims to be barred, leaving it to them to apply to open the rule. *Anderson v. Calloway*, 2 Law J., Ex. 32; 1 C. & M. 182.

A claimant who fails to appear on an interpleader rule, obtained by the sheriff, is not bound to pay the sheriff his costs. *Jones v. Lewis*, 10 Law J., Ex. 320.

*Special damage not cognisable under the Interpleader Act.]* Goods consigned to the plaintiff in the defendant's warehouses were claimed by a third party, and the plaintiff refused to indemnify the defendants, and brought trover, with counts for special damage. The court refused a rule under 1 & 2 Will. 4, c. 58, but allowed the defendants on an undertaking to deliver up the goods, to strike out the count in trover, and leave the plaintiffs to proceed for special damage only. *Lucas v. London Dock Company*, 4 B. & Ad. 378.

The 1st section of the Interpleader Act, 1 & 2 Will. 4, c. 58, does not apply to actions for unliquidated damages. *Walter v. Nicholson*, 6 Dowl. 517, B. C.

*Costs of a stakeholder under an interpleader rule.]* The court held, that where the stakeholder acts bona fide, he will be entitled to recover his costs out of the subject-matter in dispute, to be borne ultimately by the unsuccessful party. *Reeves v. Barraud*, 7 Scott, 281.

*Verdict and judgment on an issue under an interpleader rule.]* The verdict on a feigned issue, under the Interpleader Act, must be entered up as section 7 of that act directs; and therefore, a judgment signed in an ordinary manner on such issue was set aside by the court. *Dickinson v. Eyre*, 7 Dowl. 721, Q. B.

*Interpleader order, sheriff's expenses.]* Where the sheriff, having seized certain horses which were claimed by a third party, applied for relief under the Interpleader Act, and obtained a judge's order that, on payment of a sum of money into court, and on payment to the sheriff of possession money from the date of the order, the sheriff should withdraw from possession:—Held, that the sheriff was not entitled to detain the horses for the expense of their keep. *Gaskell v. Sefton the Yr.* 15 Law J., Ex. 107; 3 Dowl. & L. 267.

*An interpleader order imposing costs may be reviewed by the court.]* A judge's order imposing costs in the matter of an interpleader order heard at chambers, may be reviewed by the court. *Teggin v. Langford*, 10 Mee. & W. 556; 2 Dowl. N. S. 467.

*Nisi Prius record after verdict on a feigned issue.]* Where goods have been taken under a fi. fa., and an issue is directed to try whether the goods were those of a third person, and, on that issue, the jury at the assizes find for such person, who is plaintiff in the issue, the practice is for the associate to keep the Nisi Prius record till after the fourth day of the next term, unless the judge orders it to be immediately delivered up to the plaintiff's attorney, upon an application in the nature of an application for speedy execution. *Abbot v. Clarke*, 2 Car. & K. 209.—Patteson, J.

*Feigned issue in the form of a wager not abolished.]* A feigned issue alleging a pretended wager is not rendered illegal by the statute against wagers, 8 & 9 Vic. c. 109, s. 19 of which gives a new form for the issue, but either form of issue may be used. *Luard and another v. Butcher and another*, 15 Law J., C. P. 187; 2 C. B. 858.

*Interpleader issue where part only of the goods was proved to belong to plaintiff, verdict.]* Where the declaration in an issue under the Interpleader Act states, that "divers goods and chattels" were seized under a fi. fa., and avers that "the said goods and chattels were the property of the plaintiff," unless the plaintiff proves that the whole of the goods belong to him, the defendant will be entitled to a verdict; but, semble, that if a part of the goods belonged to the plaintiff, the judge would ask the jury to find specially. *Morewood v. Wilkes*, 6 Car. & P. 144.—Tindal, L. C. J.

*Apportionment of costs on interpleader issue.]* The court will, when necessary, apportion the costs of an issue under the Interpleader Act, among the different parties, according to the result of the issue upon their different interests. *Dixon v. Yates*, 5 B. & Ad. 313; 2 Law J., K. B. 198; 2 N. & M. 177.

*Costs on interpleader issue where part only of the goods found for the claimant.]* On the trial of an interpleader issue the jury found that certain goods of the value of 5*l.* were the goods of the claimant; the judge at chambers ordered the costs of the issue and of the application to be taxed and paid by the claimant, minus 1-15th, the assumed proportion of the goods found for the claimant. On a motion to set aside this order, on the ground that the jury having found for the claimant, he was entitled to the whole costs; the court refused to set aside the order, and expressed a doubt whether the claimant ought to have any costs. *Marks v. Ridgway*, MS. Exch. Trin. T. 1847.

L. having recovered judgment against H., sued out a fi. fa., under which the sheriff seized five horses in the possession of H. T. laid claim to all these horses, and thereon, under an interpleader rule, ordering the sheriff to sell the horses and pay the proceeds into court, and directing an issue between T. as plaintiff and L. defendant, in which the question should be, whether the said five horses, and each and every of them, were and was the property of T. At the trial of the issue, T. established his claim to two horses only, the evidence to each of the five being wholly distinct. By a judge's order the proceeds of the sale of the two horses were paid out of court to T. Upon a subsequent application to the court by T. for the costs of the issue, and of such judge's order, the court directed, first, that no general costs of the issue, or of such last application, should be payable by either party; secondly, that L. should pay to T. his costs up to the time the feigned issue was granted, and also the costs of obtaining the judge's order to have the proceeds of the two horses paid out of court to him; thirdly, that the master should tax the costs of each party, as if upon separate issues, with respect to each of the five horses in dispute; that L. should pay to T. the costs incurred in establishing his right to two, and T. should pay to L. the costs incurred respecting the three as to which he had failed. *Lewis v. Holding*, 10 Law J., C. P. 204.

*Costs under Interpleader Act.]* A claimant under the Interpleader Act, who complains that some of his goods have been seized in execution against a third person, is in the same situation as a plaintiff in

trover, and must have his costs in the same way. *Staley v. Bedwell*, 10 Ad. & E. 145; 8 Law J., Q. B. 233; 2 P. & D. 309.

A tenant against whom an action for use and occupation has been brought, who applies to the court under the Interpleader Act, in consequence of another party requiring the rent to be paid to him, is not entitled, on such party abandoning his claim, to be paid his costs by the plaintiff, or out of the rent admitted to be due, and which he offers to pay into court. *Murdock v. Taylor*, 8 Sc. 604; 9 Law J., C. P. 183; 6 Bing. 293.

Where a party succeeds on an issue directed under the Interpleader Act, he has a right to his costs of applying to take the proceeds of the sale out of court, although he has not applied to the opposite side for their consent to take the money out. *Meredith v. Rogers*, 7 Dowl. 596.

Where a party has succeeded on an issue directed under the Interpleader Act to try the right to certain property, he is entitled (as against the unsuccessful party), to the costs of applying to the court, in order to obtain the property in question from the stakeholder, an application having been made to the latter, and he having properly awaited the decision of the court before he gave it up. *Barnes v. Bank of England*, 7 Dowl. 319.

Where the sheriff's rule under the Interpleader Act does not defray costs, and the claimant does not appear, the court will not on disposing of the rule, at once order the claimant to pay costs, but will make an order conditional on his not appearing within a certain period. *Shuttleworth v. Clark*, 4 Dowl. 561.

The court will not, under the Interpleader Act, allow the sheriff his costs incurred by keeping possession, in consequence of a party refusing to consent to a judge at chambers making an order in the case, no authority for that purpose being given by 1 & 2 Will. 4, c. 58, s. 6. *Clark v. Chetwode*, 4 Dowl. 635.

The court will allow a sheriff to deduct the expenses of a sale effected by the authority of the court under the Interpleader Act, although it appears on the trial of an issue that the seizure was wrongful. *Bland v. Delano*, 6 Dowl. 293.

An application by a successful party in an issue directed under the Interpleader Act for costs, &c., may be made before judgment actually signed, but the rule cannot be drawn up except on condition of its being signed. *Bland v. Delano*, Ib.

In a feigned issue directed under an interpleader rule, the plaintiff claimed 182*l.* and recovered only 50*l.*; a judge at chambers in the exercise of his discretion given to him by the statute, directed each party to pay his own costs; the court refused to grant a rule to set aside the order. *Carr v. Edwards*, 8 Scott, 337; 8 Dowl. 29.

*Application for costs on an interpleader order to the judge not the court.]* Where an application for an interpleader rule is made to a judge at chambers pursuant to the statute 1 & 2 Vic. c. 45, s. 2, a judge at chambers only, and not the court, has authority as to the costs of the proceedings. *Burgh v. Scholefield*, 9 Mee. & W. 478; 2 Dowl. N. S. 261; and *Marks v. Ridgeway*, MS. Exch. T. T., 1847.

*Cost of rule, where plaintiff abandons his execution.]* A f. fa.

## IRREGULARITY.

issued at the suit of the plaintiff, the sheriff's officer informed the plaintiff's attorney that the defendant's goods had been seized under a prior writ. The plaintiff did not withdraw his writ, or give notice that he withdrew his claim. A third party having claimed the goods, the sheriff obtained a rule under the Interpleader Act, and the plaintiff withdrew his execution. It was contended that the rule ought to be discharged with costs:—Held, there was no occasion at all for the plaintiff to appear, if he intended to relinquish. He is certainly not entitled to costs. *Glasier v. Cooke*, 5 N. & M. 680.

## IRREGULARITY.

*Irregularity—application to a judge at chambers.]* If an application is made to a judge at chambers to set aside proceedings on the ground of irregularity, the question whether or not the application is made in time, is entirely in his discretion, and the court will not review his decision in this respect.

The law is the same, whether the judge at chambers refused or granted the application.

Where, therefore, a judge at chambers dismissed a summons for setting aside the service of the notice of declaration and subsequent proceedings for irregularity, on the ground that the application was made too late, this court refused to interfere. *Lane v. Newman*, 10 Jur. 925, B. C.—Wightman, J., 1 B. C. Rep. 93.

*To set aside proceedings for irregularity when application must be made.]* The plaintiff having irregularly signed judgment for want of a plea on the 31st December; on the 11th January the defendant was taken in execution, and on the 23rd January moved to set aside all proceedings for irregularity:—Held, too late. *Alsager v. Crisp*, 10 Law J., Q. B. 130.

Where a party takes a step in a cause in which there is an irregularity or defect known to him, of which he does not then avail himself, he will not subsequently be allowed to take advantage of such defect or irregularity. *Anderson v. Harrison*, 8 Jur. 603, B. C.—Williams, J.—2 Dowl. & L. 91.

Application to set aside proceedings for irregularity must be made within a reasonable time after the irregularity occurs, and therefore, in a case where the defendant suffered two terms to elapse before applying to the court for a rule on the master to review his taxation of costs, the court refused to give him the rule. *Claridge v. M'Kenzie*, 2 Dowl. N. S. 898; 12 Law J., C. P. 131.

Ten days is too great a delay in applying to set aside the service of a writ of summons on the ground that it had been effected in a wrong county. *Davis v. Sherlock*, 7 Dowl. 530.

A defendant cannot wait until the ensuing term to take advantage of an irregularity in the service of process in the vacation; but he is bound to apply promptly to a judge at chambers. *Cox v. Tullock*, 2 Law J., Ex. 233; 1 C. & M. 531; 2 Dowl. 47.

The court will not entertain objections to the regularity of proceedings, where the party has neglected to avail himself of opportunities to urge them at an early period, even though they amount to error on the face of the record. *Graves v. Walter*, 1 Scott, 310.

A motion to set aside the service of the notice of declaration, and subsequent proceedings for irregularity, must be made before the time for pleading has expired. *Willis and another v. Ball*, 11 Law J., Q. B. 13.

Where there appears to have been a delay of more than eight days before moving to set aside proceedings for irregularity, the defendant must clearly explain the delay, otherwise the presumption will be against him. *Herbert v. Darley*, 4 Dowl. 726.

Where on the eighth day after the service of a copy of a writ of summons, such eighth day being before the first day of term, an application was made in court to set aside the service, on the ground of irregularity, it was held, that the motion was regular, and that the defendant was not bound to have gone to chambers in the intervening time. *Day v. Holly*, 2 Dowl. N. S. 974, B. C.—Wightman, J.

In term time where the irregularity occurred seven days before the application, which was to set aside a declaration:—Held, too late. *Fyson v. Kemp*, 2 Dowl. 620; 4 Tyrw. 990; 3 Law J., Ex. 205.

*Setting aside proceedings for irregularity—application to the court after an unsuccessful one at chambers.]* Where application is made to set aside proceedings for irregularity after eight days, but within the eight days a similar application had been unsuccessfully made to a judge at chambers, the court cannot take notice of such application at chambers, unless it be shown on affidavit, even though the judge, being in court, certifies the fact. *Goren v. Tute*, 7 Mee. & W. 142; 10 Law J., Ex. 61.

*Setting aside proceedings for irregularity is not a step taken in the cause.]* The rule requiring a term's notice before any step be taken in a cause, after the lapse of four terms, does not apply to a motion to set aside proceedings for irregularity, but only to any steps taken towards judgment. *Lumley v. Thompson*, 3 Mee. & W. 632.

*Setting aside proceedings for irregularity—costs.]* On setting aside proceedings for irregularity, costs not given unless prayed for by the rule. *Rex v. Sheriff of Middlesex*, 2 Law J., Ex. 235; 1 C. & M. 486; 2 Dowl. 5.

*Offer to pay the costs of an irregularity in declaration.]* After an offer to pay the costs of an irregularity on a declaration, the defendant must pay the costs incurred since the offer. *Beeston v. Beckett*, 4 M. & Ry. 100, K. B.

*Irregular proceedings set aside—imposing terms.]* If a proceeding is irregular, the opposite party has a right to have it set aside; and therefore if the terms of bringing no action be not imposed by the court at the time of disposing of the rule for setting aside the irregular proceeding, the successful party cannot be restrained from bringing an action in respect of the irregularity. *Abbot v. Greenwood*, 7 Dowl. 534.

*Irregular proceedings—motion to set aside by infant defendant.]* A motion on behalf of an infant defendant to set aside irregular proceedings may be made by his father or an attorney, but it must appear

to be made with the consent of the defendant. *Nunn v. Curtis*, 4 Dowl. 729; 1 T. & G. 500.

*Proceedings on an irregular affidavit may be voidable but not void.]* Where in an action of trespass for false imprisonment the defendant justified under process of outlawry, the plaintiff replied there was no affidavit of debt, and the defendant rejoined that there was such affidavit, and set out an irregular affidavit, and the plaintiff demurred: it was held that the defendant was entitled to judgment, trespass not being maintainable where the process is irregular merely, and not void; though the affidavit to hold to bail was irregular, the proceedings which had taken place upon it were only voidable and not void; and the plaintiff (the defendant in the original action) should have applied to the court for the purpose of having them set aside before he commenced the present action. *Riddell v. Pateman*, 2 C. M. & R. 30.

*Irregularity, signing judgment for.]* In general the court will not authorise a party to sign judgment for irregularity, but will leave him to take that step at his own peril. *Finn v. Woodman*, 2 C. & J. 464; 1 Law J., Ex. 132; 2 Tyrw. 492.

*Irregularity waived by act of defendant.]* On a motion to set aside a trial and verdict, upon the ground of irregularity in the record, in omitting the dates of the teste and return of venire and habeas corpora juratorum:—Held, first, that the objection had been waived by the defendant's suing out a writ of error; secondly, that the omissions having been caused by the delay of the defendant in delivering pleas, which he had been allowed to amend under a judge's order, on condition that the plaintiff should be entitled, at all events, to go to trial on a certain day, the objection was made against good faith. *Ouchterlony v. Gibson*, 12 Law J., C. P. 94.

### JUDGMENT.

*Judgment, date of.]* The day of which a judgment is entered of record, for the purpose of the rule of H. T. 4 Will. 4, R. 3, is the day on which the taxation of costs is completed. Where the postea had been marked on the 13th December, defendant died on the 15th, costs were taxed on the 1st of February, and plaintiff entered the 13th of December as the date of the judgment; the date was altered to the latter day on the application of the executors of the defendant, who had obtained a writ of error, assigning for error the death of the defendant. *Peirce v. Derry*, 12 Law J., Q. B. 276.

*Judgment signed too soon may be abandoned by notice.]* A plaintiff who has signed an interlocutory judgment for want of a plea too soon, or irregularly, may avoid an application to set it aside by giving notice of his intention to abandon it. *Robinson v. Stoddart*, 5 Dowl. P. C. 266; and *Hargrave v. Holden*, 3 Dowl. P. C. 176.

*Signing judgment where a plea is a nullity.]* Where a plea is a nullity, the plaintiff must nevertheless demand a plea before he signs judgment, and cannot treat it as a waiver of such demand. *Hough v. Bond*, 1 Mee. & W. 314; 5 Law J., Ex. 119.

*Judgment signed for want of a plea is a final judgment.]* Where a defendant is arrested upon a writ of capias, issued under the provisions of 1 & 2 Vic. c. 110, s. 3, and judgment has been signed for want of a plea, such judgment is a final judgment, within Reg. Gen. H. T. 2 Will. 4, R. 85, though the costs may not have been taxed; and it is necessary for the plaintiff to charge him in execution within two terms after such judgment. *Walker v. De Richmont*, 14 Law J., Q. B. 22; 2 Dowl. & L. 507.

*Judgment nunc pro tunc not allowed when delay occasioned by the parties.]* The case was tried in December, 1845: there were numerous defendants, who severed in pleading. R. and S. each pleaded non assumpsit; the other defendants pleaded special pleas only, on which issues were joined, and from finding on any of which the jury were by consent discharged. R. and S. succeeded on non assumpsit, subject to a bill of exceptions, tendered by the plaintiffs. The bill of exceptions was settled and sealed in May, 1846, and the postea delivered to the defendants on the 3rd of June. Negotiations took place between the parties as to the mode of entering up judgment; the defendants submitted two forms of Judgment to the plaintiffs; one of which was altered and approved of by them, and returned to defendants on the 22nd August. The defendant R. assented to the form as altered and returned to him, and was about to sign judgment, when, on the 27th of October, R. died. On application by R.'s executors to enter up judgment nunc pro tunc:—Held, that the delay was not the act of the court, and therefore the court would not assist the executors. Held, also, that R. might have signed judgment notwithstanding the pendency of the bill of exceptions. Held, also, that though the plaintiffs were parties to the negotiations which produced the delay, they were not thereby prevented from resisting the application made by R.'s executors. *The Fishmongers' Company v. Robertson and others*, 16 Law J., C. P. 118.

The court will not allow a judgment to be entered nunc pro tunc when the non-entry at the proper time did not proceed from the act of the court, but from the laches of the party himself. *Vaughan v. Wilson*, 6 Dowl. 210; 4 Bing. N. S. 116; 3 Scott, 404; and *Miller v. Spurrs*, 2 M. & Sc. 730.

*Judgment entered nunc pro tunc.]* The proviso in rule 3 of H. T. 4 Will. 4, “that it shall be competent for the court or a judge to order a judgment to be entered nunc pro tunc,” applies only, as formerly, to cases where it is delayed by the act of the court. *Lanman v. Lord Audley*, 2 Mee. & W. 535; and *Blackburn v. Godrick*, 9 Dowl. 337.

*Judgment entered nunc pro tunc—judgment on demurrer after death of plaintiff.]* A record contained an issue in fact as well as issues in law. The issue in fact was tried in 1843, and found for the plaintiff, and a rule nisi for a new trial discharged in Trinity term, 1844. Afterwards, in the same term, the demurrer was set down for argument, but did not come on to be argued till Trinity term, 1845, when judgment was given for the plaintiff. The plaintiff having died in March, 1845:—Held, that the judgment might be entered nunc pro tunc, as of Trinity term, 1844. *Miles v. Williams*, 16 Law J., Q. B. 56.

*Judgment nunc pro tunc where plaintiff died before day named in order for judgment.]* A judge's order was made to stay proceedings on payment of debt and costs, on a day named in the order, the plaintiff having liberty to sign judgment in case they were not paid on that day. Before the day named the plaintiff died. The court refused to allow judgment to be entered *nunc pro tunc*. *Wilkins v. Cauty*, 11 Law J., Q. B. 191.

*Judgment entered nunc pro tunc on death of plaintiff.]* A cause was tried at the summer assizes, in 1839, and the plaintiff had a verdict. In Michaelmas term following, the defendant obtained a rule nisi for a nonsuit, which was made absolute in Trinity term, 1841. The plaintiff having died on 29th November, 1839, the court ordered judgment to be entered up for the defendant as of Michaelmas term, 1839. *Abington v. Lipscomb*, 11 Law J., Q. B. 15.

*Judgment entered nunc pro tunc after the death of the defendant.]* The defendant obtained a verdict in December, 1829. In the following term the plaintiff obtained a rule nisi for a new trial, which rule the court afterwards directed to be suspended, to await the issue of another cause, which involved the same point. The defendant died in November, 1830. The court, after a lapse of two years and a half from the date of the verdict, allowed the judgment to be entered up *nunc pro tunc*. *Key v. Goodwin*, 1 M. & Sc. 620.

Under the rules of Hilary term, 4 Will. 4, s. 3, where plaintiff has obtained a verdict but defendant has obtained a rule nisi for a new trial, which after the lapse of a year has been discharged, and in the meantime defendant has died, the court will order judgment to be entered *nunc pro tunc*, though more than two years have elapsed since the discharge of the rule, if it appear that the delay was occasioned by taxation of costs, and no fault be specifically imputed to the plaintiff. *Blewett v. Tregonning*, 4 Ad. & E. 1002.

*Entering up and docketing of judgment.]* A rule, calling on the plaintiff to docket the judgment, was objected to, because the rule should have been addressed to the plaintiff, and not to his attorney. The court considered the objection, that the plaintiff, and not his attorney, should have been called upon, valid, and discharged the rule with costs. *Engler v. Twisden*, 4 Bing. N. S. 714; 6 Scott, 580.

Where the issue had been docketed, the number of the judgment roll being affixed to the issue, but there had been no docket of the judgment; this was held not a sufficient docket within the statute 4 & 5 W. & M., and the court refused an application to docket the judgment *nunc pro tunc*, where the effect would be to give a priority over a mortgagee. *Hopwood v. Watts*, 5 B. & Ad. 1050; 3 Law J., K. B. 109; 3 N. & M. 146.

A docket of the issue is not a sufficient docket of the judgment within the provisions of the statute 4 & 5 W. & M. c. 20; and it is the duty of the attorney who signs judgment to see that the judgment is properly docketed. *Doe d. Barron v. Purchas*, 5 Law J., Q. B. 148.

Upon a rule granted to enter up judgment and issue execution, and the plaintiff omitted to enter an incipitur, but merely indorsed the costs allowed, and issued execution, the court held it irregular. *Finch v. Brooke*, 2 Bing. N. S. 710; 2 Scott, 511.

*Interlocutory judgment—motion to set aside.]* Where the declaration was filed and notice of declaration served upon the defendant on the 6th April, and judgment signed for want of a plea, and on the 6th May the defendant was served with notice of executing a writ of inquiry thereupon, motion to set aside such interlocutory judgment and all subsequent proceedings, upon the ground that the notice of declaration had omitted to state that unless the defendant pleaded within four days judgment would be signed :—Held, too late. *Mann v. Duncome*, 8 Jur. 539, C. P.

If a defendant seek to set aside an interlocutory judgment for irregularity, he must come to the court within a reasonable time from his knowing that it is signed, and cannot wait until a rule to compute is served. *Grant v. Flower*, 5 Dowl. 419.

*Entry of judgment where issues of law are argued after verdict on issue of fact.]* A verdict was found for the plaintiff in August, 1843, in an action in which there were issues of law and of fact. On the issues of fact, in Trinity term, 1844, a rule for a new trial was discharged. In the same term the demurrers were set down in the special paper, but were not argued till May, 1845, when judgment was given for the plaintiff. The plaintiff had died in the month of March, nearly two months before the case came on for argument :—Held, that judgment should be entered as of Trinity term, 1844. *Miles v. Bough*, 10 Jur. 390, Q. B.; 3 Dowl. & L. 105; 15 Law J., Q. B. 30; *Miles v. Williams*, 11 Jur. 36.

*Judgment signed on the certificate of an arbitrator after the return day of the distingas juratores.]* When a verdict is taken at Nisi Prius by consent, subject to the certificate of an arbitrator, the certificate relates back to the time when the verdict was pronounced by the jury; and therefore where such a certificate was given in vacation after more than four days had elapsed from the return day of the distingas juratores :—Held, that the successful party was entitled to sign judgment immediately, and was not bound to wait until the expiration of the first four days of the next term. *Cremer v. Churt*, 10 Jur. 671; 15 Mee. & W. 310; 3 Dowl. & L. 672; 15 Law J., Ex. 263.

*Judgment must not be signed after the return of summons to stay proceedings.]* Where judgment and a summons to stay proceedings are due at the same time, the latter must be attended before judgment can be signed, even though it be such as an adverse order cannot be made on. *Barton v. Warren*, 3 Dowl. & L. 142; 10 Jur. 375, B. C.—Wightman, J.

*Irregular to sign judgment on order to stay without entering an appearance.]* Where after a judge's order to stay proceedings on payment, &c., and in default the plaintiff to be at liberty to sign judgment, the plaintiff did so, but without entering an appearance (held irregular), but the defendant's attorney attended the taxation of costs :—Semblé, the irregularity would be deemed to be waived, and the omission in the bill of costs of any charge for entering an appearance would be sufficient notice thereof. *Hawkins v. Hassell*, 12 Mee. & W. 776; 13 Law J., Ex. 341.

*Final judgment signed by plaintiff's attorney, after a settlement of the action by the parties.]* The plaintiff and defendant having settled an action, after verdict for the plaintiff, without the knowledge of the plaintiff's attorney, the defendant gave notice of the compromise to the attorney, who afterwards signed final judgment. The court upon affidavits, denying any conspiracy to deprive the attorney of his costs, made a rule absolute to set aside the judgment. *Clark v. Smith*, 1 Dowl. & L. 960, C. P.

*Judgment irregularly signed.]* Where the party having signed judgment irregularly, applied to set it aside and sign it anew:—Held, only a rule nisi. *Bennett v. Simmonds*, 2 Dowl. & L. 98, B. C.—Coleridge, J.; 2 Dowl. & L. 98.

*Judgment and execution on a writ of false judgment.]* The plaintiff, on a writ of false judgment, obtained a rule to enter up judgment in the court of Common Pleas for his debt and costs in the court below, such costs to be taxed by one of the prothonotaries, and to sue out execution; instead, however, of entering up judgment, he had the officer's allocatur written upon the back of the rule, and upon this he sued out execution and made a levy:—Held, that such execution was irregular, and that the money levied under it should be refunded. *Finch v. Brook*, 5 Law J., C. P. 214; 2 Bing. N. C. 710; 2 Scott, 517; 5 Dowl. 59.

On a motion to set aside a writ of false judgment, the affidavit must not be entitled in the court below. *Watson v. Walker*, 8 Bing. 315; 1 M. & Sc. 437.

*Revival of judgment by scire facias.]* The omission to revive a judgment, which is more than a year old, by scire facias, before issuing a writ of capias ad satisfaciendum upon it, is an irregularity, but such omission does not make the writ of capias a nullity. *Blanchenay v. Burt and others*, 12 Law J., Q. B. 291.

*Judgment and execution on award and allocatur, how obtained.]* A rule to issue execution under 1 & 2 Vic. c. 110, s. 18, for money due upon an award, and the master's allocatur, is a rule nisi only in the first instance. And semble, that such a rule ought to be personally served, notwithstanding that the award and allocatur, together with the rule making the order of reference a rule of court, have been personally served, and the amount demanded. *Winwood v. Hoult*, 14 Mee. & W. 197; 3 Dowl. & L. 85; 15 Law J., Ex. 10.

*Judgment on an award, leave to enter.]* Where a verdict has been found, subject to a reference, and the award has not been made for some terms afterwards, judgment cannot be entered up as of the term next after the verdict, without a special application to the court. *Brooke v. Fearns*, 2 Dowl. 144.

*Judgment on an award, setting aside.]* A defendant may move to set aside a judgment entered up on an irregular award, though the time for setting aside the award itself has elapsed, if the defect insisted on be apparent on the face of it; an objection grounded on such

defect need not be stated in the rule nisi. *Manser v. Heaver*, 3 B. & Ad. 295.

*A judgment in an inferior court more than a year old, must be revived by sci. fa. before execution can issue.]* Where the plaintiff in an inferior court had, as it was alleged, issued execution more than a year and a day after judgment, without a sci. fa. and the defendant was thereupon taken into custody:—Held, on motion for a habeas corpus to discharge the defendant on the ground of the above defect, that the court had no power to grant a certiorari to bring up the record; the general rule being, that no certiorari will issue to bring up the record of an inferior court after judgment. *Kemp v. Blane*, 1 Dowl. & L. 885, Q. B.

*Judgment more than a year old, amended, to proceed to outlawry.]* Where the Christian name of the defendant was omitted in the writ of summons and declaration, and also in the judgment, which was drawn up in pursuance of a consent to a judge's order, signed by the defendant with his full Christian name, this court on application by the plaintiff for the purpose of proceeding to outlawry, permitted the declaration and judgment to be amended by inserting the Christian name of the defendant more than a year after the judgment was signed. *Wood v. Hume*, 10 Jur. 1008, B. C.—Wightman, J.

*Judgment signed after the death of the defendant.]* A defendant signed a cognovit, and died before the time of payment:—Held, under a judgment signed as of the preceding term in his lifetime, execution might issue. *Calvert v. Tomlin*, 5 Bing. 1; 2 M. & P. 1.

A judgment cannot now be so signed, as by the rule H. T. 4 Will. 4, it must bear date the day it is signed.

*Judgment after defendant's death, when lands bound by.]* Where a party dies after verdict and before judgment, his lands are bound in the hands of his heir by a judgment entered up within two terms after verdict, under 17 Car. 2, c. 8, s. 1. *Saunders v. M'Gowran*, 12 Mee. & W. 221; 1 Dowl. & L. 405.

*Setting off judgments.]* It is no objection to an application to set off judgments that they are in different courts, where the parties are respectively beneficially as well as legally interested in them. *Bristowe v. Needham*, 8 Scott, N. S. 366; 7 Man. & G. 648.

*Judgment for debt 12l., costs 10l. 15s., in action for penalties defendant discharged.]* Where an action of debt was brought under the 3 & 4 Will. 4, c. 15, s. 2, to recover the penalty of 40s. for each of six several representations of a dramatic piece of which the plaintiff was the author; and judgment was signed by default for 12l. debt and 10l. 15s. costs; and the defendant was taken in execution under a ca. sa. indorsed to levy those sums:—Held, that he was entitled to be discharged, under 7 & 8 Vic. c. 96, s. 57; and that the action was one “for the recovery of a debt” within the meaning of that section. *Fitzball v. Brook*, 2 Dowl. & L. 477, Q. B.

*Where judgment signed on cognovit an appearance necessary.]* Judg-

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ment signed before an appearance entered is irregular, although the defendant has given a cognovit, in which he authorizes the plaintiff's attorney to appear for him if necessary, and the attorney, on the day after judgment signed enters an appearance nunc pro tunc. *Watson v. Dore*, 2 Mee. & W. 386; 5 Dowl. 584.

*Judgment on cognovit, when may be signed.]* The signing of a cognovit relates to the date and not to the time when signed; therefore judgment may be signed the day the cognovit is executed. *Perry v. Turner*, 2 C. & J. 89; 2 Tyrw. 128.

*Judgment in default of payment of debt and costs—taxation of costs necessary.]* Where no judgment is to be signed unless default be made in payment of debt and costs:—Held, that the costs must be taxed, or notice given of waiving them, before judgment could be signed. *Booth v. Parker*, 3 Mee. & W. 54; 6 Dowl. 87.

In a subsequent case it was held, judgment may be signed, but execution cannot issue until after taxation. *Barratt v. Partington*, 7 Dowl. 447; 5 Bing. N. S. 487.

*Signing final judgment.]* Entry of judgment is not final until costs have been taxed. *Pierce v. Derry*, 4 Q. B. 635.

Plaintiff having obtained a verdict in July, 1841, entered judgment on the postea 13th December, 1841, dating the entry as of that day; afterwards he taxed costs, but not till the expiration of two terms after verdict. Plaintiff then entered up judgment on the judgment-roll, as of 13th December, 1841. Between 13th December and the last-mentioned entering up of judgment the defendant died. His executors brought error on that ground; and the court, at their instance, ordered the date of judgment on the roll to be altered from 13th December, 1841, to 1st February, 1842, the day of taxation. *Ib.*

*Interest on judgment debt how calculated.]* By 1 & 2 Vic. c. 110, s. 17, every judgment debt shall carry interest from the time of entering such judgment:—Held, that the time of the entering of the judgment mentioned in this section is the time of the signing of the judgment, and the entry of the incipitur in the paper book kept in the master's office for the purpose, and not the subsequent entry of the judgment upon the roll. *Fisher v. Dudding*, 10 Law J., C. P. 323.

*Judgment non obstante veredicto.]* Where a defendant pleaded a defence under a particular statute, but after plea, and before trial, the statute was repealed, and another enacted in its stead, which did not afford the same defence:—Held, that the plaintiff was entitled to judgment non obstante veredicto. *Warne v. Beresford*, 2 Mee. & W. 848; 6 Law J., Ex. 192; 6 Dowl. 157.

*Judgment non obstante veredicto, not granted on plea, good after verdict.]* In assumpsit on a bill of exchange by the indorsee against the immediate indorser, the defendant pleaded that he indorsed the bill to the plaintiff without having or receiving any consideration, upon which the plaintiff took issue in the terms of the plea. After verdict for the defendant, the plaintiff moved for judgment non ob-

*stante veredicto*, on account of the insufficiency of the plea :—Held, that the plea was good after verdict, though it might have been objected to on demurrer. *Easton v. Pratchett*, 3 Dowl. 472.

*Judgment non obstante veredicto, when must be moved for.]* A motion in arrest of judgment, or for judgment non obstante veredicto, must, in the Exchequer, be made within four days of the time of trial, if in term; and if not, within the first four days of the next succeeding term. *Thomas v. Jones*, 6 Dowl. 663.

*Judgment non obstante veredicto—writ of inquiry or venire de novo.]* Where a plaintiff has obtained a judgment non obstante veredicto on all the pleas, he may execute a writ of inquiry to assess his damages, without leave of the court. But where any of the pleas are good, and the defendant entitled to retain his verdict on them, there must be a venire de novo. *Shepherd v. Halls*, 2 Dowl. 453.

*Judgment non obstante veredicto cannot be moved for by defendant.]* Where there was a verdict for plaintiff, and the defendant moved for judgment non obstante veredicto, for the insufficiency of the replication, the court said there was no instance of such a motion upon the part of a defendant. *Rand v. Vaughan and another*, 1 Hodges, 173.

*Judgment non obstante veredicto—plea or rejoinder must admit plaintiff's title.]* A plaintiff is never entitled to judgment non obstante veredicto, upon the ground of the insufficiency of the defendant's pleading, where the issue on the plea or rejoinder is found for the defendant, and against plaintiff, unless such plea or rejoinder implies an admission of the plaintiff's title. *Pim v. Grazebrook*, 2 C. B. 429; 3 Dowl. & L. 454; 10 Jur. 250.

*Judgment non obstante veredicto refused after judgment on demurrer for defendant.]* Defendant in an action pleaded several pleas in bar, to one of which (extending to the whole cause of action) plaintiff demurred; on the others issues of fact were taken. Defendant had judgment on the demurrer, the court holding the declaration bad. The issues in fact were tried, and found for the plaintiff, except one (extending to the whole cause of action), which was found for the defendant, and was immaterial. Plaintiff, to avoid paying costs on this issue, moved for judgment thereon, non obstante veredicto, or for a repleader:—Held, that judgment non obstante veredicto could not be awarded, as it would be inconsistent with the judgment already given that the plaintiff should not recover. And that a repleader could not be awarded, as the parties must, in that case, be ordered to replead from the plea downwards, and such direction would lead to an absurdity on the record, since the court had already held the declaration bad. *Willoughby v. Willoughby*, 6 Q. B. 722.

*Judgment non obstante veredicto, costs of rule for.]* Where a rule nisi for judgment non obstante veredicto has been discharged generally, the successful party is entitled to the costs of showing cause against it. *Hodgkinson v. Wyatt*, 13 Law J., Q. B. 73.

*Arrest of judgment.]* The declaration contained a good and a bad count, with a general averment of damage:—Held, that the court could not arrest the judgment, but that the proper course was to award a *venire de novo*. *Emblin v. Dartnell*, 12 Mee. & W. 830.

Where, in debt on simple contract, the declaration contains good and bad counts, and nominal damages are assessed on the whole, the court will award a *venire de novo*. *Lewin v. Edwards*, 9 Mee. & W. 720.

*Arrest of judgment cannot be moved for after cause referred.]* Where the cause is referred on the usual terms of not bringing a writ of error, the parties are precluded from moving in arrest of judgment. *Chownes v. Brown*, 2 Dowl. & L. 706.

The court will not grant an application to stay a judgment merely because another trial is pending. *Yates v. Dublin Steam Packet Company*, 8 Dowl. 402; 3 Mee. & W. 77.

*Arrest of judgment, when must be moved for.]* A cause was tried on the 18th April, in Easter term, which ended on the 8th May. The *distringas* was returnable on the 23rd April, and a motion in arrest of judgment was made on the 26th:—Held, that the motion was too late, within the Reg. Gen. H. T. 2 Will. 4, pl. 65, not being made within four days from the day of trial. *Moon v. Robinson*, 14 Law J., Ex. 310; 14 Mee. & W. 427.

*On arrest of judgment, a fresh action cannot be commenced until the judgment be completed.]* Where judgment was arrested by the court in the morning, and a fresh writ was served by the plaintiff upon the defendant in the evening, the judgment of the court not having been recorded, nor the rule of court served upon either party, the court set aside the writ as irregular. *Hayter v. Moat*, 2 Mee. & W. 56; 6 Law J., Ex. 32; 5 Dowl. 329.

*Judgment signed by leave notwithstanding writ of error coram vobis.]* A writ of error coram vobis is not in itself a supersedeas of execution, but prevents the other party from taking out execution, except by leave of the court or a judge. Therefore, where the plaintiff, after notice of a writ of error coram vobis, sued out execution by leave of a judge, the court held the execution regular. *Semple v. Turner*, 9 Law J., Ex. 101.

*To set aside a judgment, application must be made promptly.]* An application to set aside a judgment, on the ground that the signing of it was contrary to good faith, must be made promptly. *Saunders and others, assignees, v. Jones*, 15 Law J., Q. B. 273.

Where goods were taken on the 1st March under a *fi. fa.*, upon an irregular judgment; on the 15th a fiat was awarded against the execution debtor, and assignees were chosen on the 12th April, the judgment roll was carried in on the 19th April. A motion on the 25th, to set aside the proceedings, was held not to be too late. *Brooks v. Hodson*, 7 Man. & G. 529.

Where judgment was signed on the 23rd, and a summons to set it

aside was obtained on the 25th, and dismissed on the 26th:—Held, that an application to the court on the 29th was not too late. *King v. Myers*, 5 Dowl. 686.

*To set aside judgment for irregularity application must be made within a reasonable time.]* If a plaintiff proceeds to judgment and execution, without any service of the writ of summons, this is an irregularity only; and an application to set aside the proceedings must be made within a reasonable time after the defendant has notice of them. *Holmes v. Russell*, 10 Law J., Q. B. 357.

Judgment for want of a plea was signed on the 17th April, and a summons taken out to set it aside, which was discharged on the 23rd. Execution was issued on the 27th, and on the 28th the defendant applied to the court to set aside the judgment for irregularity:—Held, too late. *Shield v. Quick*, 10 Law J., Ex. 270.

*Setting aside judgment signed for want of a plea.]* Where the plaintiff's Christian name was correct in writ of summons, but wrong in the declaration, and the time for pleading having expired without the defendant's taking the declaration out of the office, the plaintiff signed judgment for want of a plea:—Held, that the defendant could not set the judgment aside on the ground of the above irregularity; that it was in reality an objection to the declaration, and ought to have been taken, at all events, within the time for pleading. *Kitchen v. Brooks*, 5 Mee. & W. 522.

*Judgment set aside where appearance entered sec. stat. for infant defendant.]* Where a plaintiff appeared sec. stat. for an infant defendant, the court set aside the appearance and subsequent proceedings without costs. *Stephens v. Lowndes*, 3 Dowl. & L. 205.

*To set aside a judgment irregularly signed.]* Where a notice to plead omitted to state in how many days the defendant was to plead, and the plaintiff signed judgment for want of a plea; the court refused to set aside the judgment for irregularity, the defendant having allowed eighteen days to elapse between the service of the notice and the date of his application to the court. *Ramm v. Duncomb*, 2 Dowl. & L. 88, C. P.

The court refused to set aside an interlocutory judgment (which had been irregularly signed three years ago) upon payment of costs, though proceedings by *scire facias* had been only lately commenced. *Lewis v. Browne*, 3 Dowl. 300, Ex.

Judgment signed in November, 1833; the plaintiff took no further step till January, 1835, when he gave a term's notice of executing a writ of inquiry. In April, notice of executing it for the 28th of May was served on the defendant in person. On the 27th of May the defendant took out a summons to set aside the judgment for having been irregularly signed after plea delivered, returnable the next day at three o'clock, but it was not attended by the plaintiff's attorney. At four o'clock the writ of inquiry was executed. On the same day a second summons was taken out, returnable the next day, which was attended and dismissed, and an application was then made to the court to set aside the judgment and subsequent proceedings for irregularity:—

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Held, that the defendant was too late, and that the summons to set aside the judgment was not, under the circumstances, sufficient to stay the trial of the writ of inquiry. *Roberts v. Cuttill*, 4 Dowl. 204, Ex.

Where a rule is drawn up for setting aside a judgment for irregularity, an objection that it was signed against good faith cannot be entertained (though the rule was moved on that ground), that not being an irregularity. *Smith v. Clarke*, 3 Law J., Ex. 63; 2 Dowl. 218.

Upon application to set aside a judgment signed against good faith, *ex debito justitiae*,—the court said, they could not impose the terms of not bringing any action without the defendant's consent. *Cash v. Wells*, 1 B. & Ad. 375.

An application to set aside an interlocutory judgment for irregularity, after notice of inquiry, on the 4th November, was held too late on the 12th. *Scott v. Cogger*, 3 Dowl. 212.

An affidavit to set aside a regular judgment, made by the London agent to the country attorney, and stating that the deponent believed, from the instructions received from the country attorney, that the defendant had a good defence to the action on the merits :—Held, sufficient. *Schofield v. Huggins*, 3 Dowl. 427.

*Setting aside judgment—affidavit must state that judgment is signed.]* An affidavit in support of a rule to set aside an interlocutory judgment must state in express terms that judgment has been signed; and it was held not to be sufficient to state that a rule to compute had been served on the defendant. *Classey v. Drayton*, 6 Mee. & W. 17; 8 Dowl. 184.

*Setting aside judgment—costs.]* Upon a judgment set aside with costs, as irregularly signed, a judge may order a stay of proceedings until the costs be paid. *Wenham v. Downes*, 5 N. & M. 244; 3 Ad. & E. 450.

A motion to set aside judgment for want of notice to tax must be made promptly. *Routledges v. Giles*, 2 C. & J. 163.

An affidavit of merits to set aside a judgment must state a "good defence upon the merits." *Bower v. Kemp*, 1 C. & J. 287; 1 Tyrw. 260.

*Judgment on an attorney's taxed bill.]* The court will grant a rule\* directing a party to pay the amount of his attorney's taxed bill, which, under 1 & 2 Vic. c. 110, s. 18, will have the effect of a judgment, and give the attorney all remedies which by that statute are given to judgment creditors. *Neale v. Postlethwaite*, 10 Law J., Q. B. 134.—The rule was drawn up in the following form:—That the plaintiff should pay to G. S. the sum of 123*l.* 2*s.*, and that the said G. S. should abandon his right to move for an attachment.

A judge's order under 6 & 7 Vic. c. 73, s. 43, ordering judgment to be entered up for the amount found by the master's allocatur to be

\* It appears that this is a rule to show cause, as in *Rickards v. Patterson*, 10 Law J., Ex. 272, it was held that a judge's order for the payment of money under the above statute cannot be granted ex parte.

due on an attorney's bill of costs, has the same force as a rule of court for the payment of money, under the 1 & 2 Vic. c. 110, s. 18. No action, therefore, need be brought on such order, and if brought, the costs of the writ, declaration, and appearance will not be allowed. *Griffiths v. Hughes*, 16 Law J., Ex. 176.

*Judgment roll, entering satisfaction on.]* The court will not allow satisfaction to be entered upon the judgment roll without a warrant of attorney from the plaintiff to acknowledge the same. The consent of the parties will not suffice. *Wood v. Hurd*, 5 Law J., C. P. 312; 3 Bing. N. C. 45; 5 Dowl. 1SS.

In an action by five plaintiffs, the court refused to allow satisfaction to be entered on the judgment roll, on a warrant of attorney, signed by four of them only, although it was sworn that the other plaintiff had gone to settle in America, and that the damages were merely nominal. *Daris v. Jones*, 4 Scott, 202; 5 Dowl. 503.

*Charging a fund with the payment of money under a judgment.]* A judge at chambers only, and not the court, has authority, under the stat. 1 & 2 Vic. c. 110, s. 14, to make an order to charge a fund with the payment of money recovered by a judgment: if he makes an absolute order, the court has jurisdiction to set it aside if wrongly made; but if he only makes an order nisi, the court has no authority to entertain the question, although the judge expresses his desire to refer it to the court. *Brown v. Bamford*, 9 Mee. & W. 42.

*Action on a judgment, the debt being under 20*l.*]* Where the defendant consented to pay the debt (under 20*l.*) and costs by instalments, under a judge's order, and upon default made in any payment the plaintiff to be at liberty to sign judgment for the whole, which having done and the action brought on the judgment:—Held, that under 7 & 8 Vic. c. 96, the court had no power to interfere to deprive the plaintiff of the right of action. *Hopkins v. Freeman*, 13 Mee. & W. 372; 2 Dowl. & L. 447.

The court will not interfere under 7 & 8 Vic. c. 96, s. 57, to stay the proceedings in an action upon a judgment for debt and costs in a former action, although it appears that the sum recovered in the original action did not exceed 20*l.* *Joseph v. Buxton*, 2 Dowl. & L. 835, C. P.

*In an action on a judgment under 20*l.* defendant may be taken in execution.]* Since the 7 & 8 Vic. c. 96, a defendant may be taken in execution, in an action on the judgment recovered, though the debt recovered in the former suit was under 20*l.*, and the second action is brought within a year. *Mason v. Nicholls*, 14 Mee. & W. 118.

*Judgment signed and costs taxed in vacation—motion in following term.]* On the 21st of November an application was made and a rule nisi obtained under the stat. 5 & 6 Vic. c. 122, for the plaintiff to refund the money paid under an execution except the amount of the debt recovered, and to pay the defendant's costs of the action and to enter a suggestion on the roll under the above statute. The judge

at the trial had granted a certificate for speedy execution, on which judgment was signed, the costs taxed and execution issued:—Held, that the application was too late, that it ought to have been made within the first four days of term. *Smith v. Temperley*, MS. Exch. H. T. 1847.

*Judgment, registration of, after discharge of defendant in execution.]* Where a judgment debtor, taken in execution, was after a month's imprisonment released from prison by the judgment creditor, who, three years afterwards, registered pursuant to the 1 & 2 Vic. c. 110, and 2 & 3 Vic. c. 11, the court made absolute a rule to enter up satisfaction of the judgment, or to strike out the registration, the debtor paying the expenses of whichever alternative he adopted. *Lambert v. Parnell*, 15 Law J., Q. B. 55.

*Judgment of a court at Westminster conclusive until reviewed by a court of error.]* The Court of Exchequer having delivered judgment in two cases relating to the liabilities of provisional committee-men, the Court of Common Pleas granted a rule nisi which involved the same point (which the Court of Exchequer had decided) before their judgment was delivered:—Held, that the judgment of one court of Westminster Hall is binding upon the others, and is only to be reviewed by a court of error. *Barker v. Stead*, 16 Law J., C. P. 160.

*Judgment as in case of a nonsuit.]* The following rule was pronounced by the Court of Exchequer after a conference with the Court of Common Pleas respecting the case of *Higgins v. Stanley*, 2 Man. & G. 336, and over-ruling that decision:—

*IN TOWN CAUSES.] Issue joined in or in the vacation before any term, a motion for judgment as in case of a nonsuit may be made in the second term next after. Thus issue joined in or in vacation before Hilary, motion may be made in Trinity term.*

*IN COUNTRY CAUSES.] Issue joined in or in vacation before an issuable term—motion after the lapse of two assizes. Issue joined in or in vacation before a non-issuable term—motion after the lapse of one assize.*

*Judgment as in case of nonsuit, time of moving for.]* For the purpose of obtaining judgment as in case of a nonsuit, issue joined in vacation is to be considered as joined in the next ensuing term. Therefore, where issue was joined in a country cause in Michaelmas vacation, and no notice of trial given, a motion for judgment as in case of a nonsuit in Trinity term was held premature. *Dore v. Hayden*, 6 Mee. & W. 626; 9 Law J., Ex. 323.

Where issue is joined in a town cause in vacation, it is too early to apply for judgment as in case of a nonsuit in the next term but one after it is so joined. *Heal v. Curtis*, 2 Mee. & W. 76; 6 Law J., Ex. 23; 5 Dowl. 294.

The lapse of eight years between the joining of the issue and the application for judgment as in case of a nonsuit, is no ground for discharging the rule. *Curtis v. Tabram*, 4 Dowl. 600; 1 Har. & W. 645; and *Cromery v. Brown*, 4 Dowl. 288.

If a plaintiff give notice of trial for the sitting in the term in which issue is joined, and do not enter the cause for trial accordingly, the defendant may move for judgment as in case of a nonsuit in the succeeding term. *Hay v. Howell*, 2 N. R. 397.

Issue was joined in Easter term, and notice of trial given in the following vacation for the second sittings in the next Trinity term, but the notice was countermanded in the same term:—Held, that the defendant could not move for judgment as in case of a nonsuit in Trinity term. *Phillips v. Eardley*, 6 Scott, 602; Arn. 275; 2 Jur. 518.

In a town cause, issue was joined and notice of trial given for the sittings in Michaelmas term. The cause was made a remanet, but the plaintiff did not proceed to trial. In Easter term a rule was made absolute for the costs of the day for not proceeding to trial, and subsequently a rule nisi was obtained for judgment as in case of a nonsuit, which rule was discharged in Trinity term. In the same term the defendant obtained a similar rule nisi. No fresh notice of trial had been given:—Held, that the defendant was entitled to move for judgment as in case of a nonsuit. *Smith v. Pole*, 5 Mee. & W. 491; 7 Dowl. 792.

*Motion for judgment cannot be made in the same term that the default occurs.]* Issue was joined in Trinity term and an insufficient notice of trial given for the adjourned sittings after Trinity term; the defendant refusing to accept the notice, a second notice was given for the first sitting in Michaelmas term; the plaintiff not proceeding to trial pursuant to this notice, the defendant in the same term moved for judgment as in case of a nonsuit:—Held, too soon. *Clark v. Goldsmid*, 6 Scott, 894; 7 Dowl. 151; 5 Bing. N. C. 120.

Issue was joined in vacation in a country cause and in the following term notice was given to try before the sheriff within the same term:—Held, that after default by plaintiff, the defendant could not in the same term move for judgment as in case of a nonsuit. *Linley v. Pouton*, 1 Gale, 158; 5 Tyrw. 818. So semble in town causes. *Ib.*

Judgment as in case of a nonsuit cannot be moved for in the same term that default has been made although issue was joined two terms previously. *Gripper or Smith v. Lord Templemore*, 5 Dowl. 408; W. W. & D. 65; 1 Jur. 705.

Judgment as in case of a nonsuit cannot be moved for in the same term for which notice of trial had been given. *Preedy v. Macfarlane*, 2 Dowl. 216; 4 Tyrw. 93; and *Begbie v. Grenville*, 3 Law J., Ex. 21.

Where notice of trial was given for the second sitting in the term of which issue was joined and countermanded:—Held, that the defendant could not move for judgment as in case of a nonsuit in the same term. *Isaac v. Goodman*, 2 Dowl. 34.

Issue joined in Trinity term and notice of trial given for the second sitting in Michaelmas term, but countermanded; the defendant then moved for judgment as in case of a nonsuit, there being time in the term to give notice for the sittings after term:—Held, too soon. *Marshal v. Forster*, 2 Dowl. 228; 2 C. & M. 213.

*Judgment as in case of nonsuit may be moved after any default.]* If a plaintiff gives notice of trial earlier than he is bound to do by the

practice of the court, and neglects to try the cause pursuant to such notice, he is guilty of a default, and the defendant, in the next term, may move for judgment as in case of a nonsuit, although the plaintiff has subsequently given a second notice of trial for that term. *May v. Husband*, 9 Law J., Ex. 34; 5 Mee. & W. 493; 7 Dowl. 867.

*Judgment may be moved although notice and countermand in due time.]* If a plaintiff give notice of trial, he is liable to have judgment as in case of a nonsuit against him, although he duly countermand the notice, and would not have been in default if no notice had been given. *Draine v. Russell*, 10 Jur. 392, B. C.—Coleridge, J.

Countermanding a notice of trial does not interfere with the defendant's right to obtain judgment as in case of a nonsuit, although issue has been joined in the same term as that in which notice is given. *Dennehey v. Richardson*, 4 Dowl. 13.

Where a defendant is entitled to judgment as in case of a nonsuit, for not giving notice of trial, he is not deprived of his right by the plaintiff giving notice before motion made. *Smedley v. Christie*, 2 Dowl. 152.

*Affidavit for motion for judgment.]* An affidavit in support of a motion for judgment as in case of a nonsuit must state the venue. *Withers v. Spooner*, 5 Man. & G. 268; 6 Scott N. R. 692.

An affidavit in support of a motion, stating notice of trial given, is sufficient without alleging that the cause was at issue. *Corbyn v. Hayworth*, 6 Dowl. 181; 3 Scott, 335.

*Affidavit need not state the venue if the time entitles defendant to judgment, whether town or country cause.]* An affidavit in support of a rule for judgment as in case of nonsuit need not state whether the cause is a town or a country cause, if it appear that issue were joined at such a period that in neither case the motion would be premature. *Auslow v. Cooper*, 2 Dowl. & L. 449.

*Rule for judgment as in case of nonsuit, with stay of proceedings.]* In the Queen's Bench a rule for judgment as in case of a nonsuit cannot be drawn up with a stay of proceedings. *Archer v. Smith*, 9 Dowl. 99, B. C.

In the Exchequer the rule may be with a stay of proceedings, provided the usual two days' notice of motion be given.

*A rule for judgment, &c., cannot include any other matter.]* Where the rule is moved for after money has been paid into court under 7 & 8 Geo. 4, c. 71, there cannot be added that the money be taken out of court; it must be the subject of a separate and subsequent application. *De Bedolliere v. Ryan*, 7 Dowl. 615, B. C.; and *Vale v. Gaufer*, 9 Dowl. 106, B. C.

The Rule 69 of 1 Reg. Gen. H. T. 2 Will. 4, s. 60, does not enable the court, where a rule for judgment as in case of a nonsuit for not proceeding to trial is made absolute, to grant the defendant the costs of the day, on disposing of that motion. *Johnson v. Smith*, 1 Dowl. 421.

*Issue must be perfectly joined before motion for judgment.]* Where

the plaintiff replies issuably, but does not add the similiter for the defendant, the latter is not entitled to judgment as in case of a nonsuit, unless he has added the similiter himself. *Brook v. Lloyd*, 1 Mee. & W. 552.

In answer to a rule for judgment as in case of a nonsuit, the plaintiff's attorney swore that he had not added the similiter, nor had it been added to his knowledge or belief:—Held, a sufficient answer. *Martin v. Martin*, 2 Scott, 389; 2 Bing. N. S. 240.

No issue is joined until the similiter be added. *Gilmore v. Melton*, 2 Dowl. 632, Ex.

Nor if the rejoinder be wanted. *Brown v. Kennedy*, 2 Dowl. 639, Ex.; and *Seabrook v. Care*, 2 Dowl. 691, Ex.

If a similiter be entitled in a wrong court it is a nullity. *Ray v. Good*, 5 Dowl. 295, Ex.

If the similiter be omitted in any one of the issues though added in the others, the defendant cannot move for judgment as in case of a nonsuit. *Wright v. Oldfield*, 8 Dowl. 899, B. C.

There can be no rule for judgment as in case of a nonsuit, when the cause is not completely at issue, although it may have been so at a former period. *Rickards v. Middleton*, 1 Man. & G. 53; 4 Jur. 340.

But the court has held that it is no longer necessary to enter the issue. *Williams v. Edwards*, 1 C. M. & R. 583.

*The Reg. Gen. H. T. 2 Will. 4, directs, that no entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso.*

Where issue had only been joined in time as to one defendant, to enable him to move, but not duly as to other defendants, the rule was refused. *Crowther v. Duke*, 7 Dowl. 409; 7 Scott, 344.

Where, in an action against four defendants, issue had been joined against three of them, and the fourth had been discharged under the Insolvent Debtors Act since the commencement of the action; the court discharged with costs a rule for judgment as in case of a nonsuit, on the ground that no complete issue had been joined. *Jackson v. Utting*, 10 Mee. & W. 640; 2 Dowl. N. S. 543.

*Judgment as in case of nonsuit where money is deposited in lieu of bail.]* A defendant who has paid money into court in lieu of bail, under 7 & 8 Geo. 4, c. 71, s. 1, is entitled, after judgment as in case of nonsuit, to a rule absolute in the first instance, for having the money paid back to him. *White v. Urwin*, 9 Law J., Ex. 150; 8 Dowl. 202.

*Judgment as in case of nonsuit—excuse for not trying pursuant to notice.]* It is a sufficient excuse, in showing cause against a rule for judgment as in case of nonsuit, for not proceeding to trial after notice of trial given, that it was necessary to countermand the notice of trial from difficulties in procuring the requisite evidence in support of the plaintiff's case. *Draine v. Russell and Wife*, 10 Jur. 392, Q. B.; and *Doe d. Ringer v. Blois*, 8 Dowl. 18, C. P.

So, where after notice of trial given, the defendant applied to and offered terms of settling the action, which negotiation was pending until after the time in which the cause could be tried, the rule for judgment as in case of nonsuit discharged with costs. *Fosberry v. Butler*, 2 Dowl. N. S. 390.

If a defendant, by negotiation, prevents a plaintiff from proceeding to trial in due time after issue joined, he cannot obtain judgment as in case of a nonsuit, on account of such delay. *Watkins v. Giles*, 4 Dowl. 14.

If a plaintiff does not proceed to trial, pursuant to notice, at the defendant's request, he is not entitled to judgment as in case of a nonsuit. *Doe d. Steppins v. Ford*, 2 Dowl. 419.

The absence of a material witness a sufficient excuse for not proceeding to trial according to notice. *Mussell v. Faithful*, 11 Jur. 270, B. C.

And a rule was discharged, where the cause shown was a bona fide compromise between the parties, although in the absence of their attorneys. *Page v. Doughty*, 4 Scott N. S. 523; and *Elias v. Elias*, 9 Dowl. 104, B. C.

An affidavit of excuse, however slight, for not proceeding to trial, is sufficient to discharge a rule for judgment as in case of a nonsuit, in a qui tam as well as in any other action. *Stone v. Furey*, 1 East, 554.

In an action against a provisional committeeman, it is no answer to a rule for judgment as in case of a nonsuit that the law in such cases is uncertain, and that the plaintiff will undertake to try the cause after the decision of the Exchequer Chamber upon a similar action there pending on a bill of exceptions. *Edwards v. Ward and others*, 11 Jur. 413, C. P.

The non-production of funds by the plaintiff to his attorney is not a sufficient answer to a rule for judgment as in case of a nonsuit. *Cleasby v. Poole*, 1 C. M. & R. 521; 4 Law J., Ex. 2; 5 Tyrw. 146.

Where a defendant took out a summons for putting off a trial at the assizes, so late before the commission day that the plaintiff thought he might be put to inconvenience in getting ready for trial, if the order was refused, and therefore countermanded:—Held, the defendant could not move for judgment as in case of a nonsuit, as upon a default of the plaintiff. *Rendill v. Bailey*, 2 Dowl. 113.

It is a sufficient answer to a motion for judgment as in case of a nonsuit, that the defendant has taken proceedings against the plaintiff in the Court of Chancery, and thereby rendered it needless to proceed to trial. *Partridge v. Salter*, 5 Dowl. 68.

It is no answer to a rule for judgment as in case of a nonsuit, that the proceedings were commenced against the defendant, without the plaintiff's authority. *Barber v. Wilkins*, 5 Dowl. 305.

*Motion for judgment, &c., pending a rule staying proceedings by one plaintiff as against another plaintiff.]* A motion for judgment as in case of a nonsuit for not proceeding to trial was opposed on the ground that one of the plaintiffs, an official assignee, had obtained a rule staying the proceedings until the other plaintiff had given security for the costs of the assignee:—Held, that a rule obtained by one plaintiff against another, and to which the defendant was no party, could not deprive him of his right to move for judgment, and made the rule absolute unless the plaintiff would give a peremptory undertaking. *Laws and another, assignees v. Bott*, MS. Exch., H. T. 1847.

*Pending a rule nisi for judgment as in case of nonsuit plaintiff*

*cannot discontinue.]* Where a rule nisi had been obtained for judgment as in case of nonsuit, with a stay of proceedings, the court set aside a rule to discontinue subsequently obtained. *Murray v. Silver*, 3 Dowl. & L. 26; 14 Law J., C. P. 236; 1 C. B. 638.

*Rule to discontinue no stay to motion for judgment as in case of a nonsuit.]* The plaintiff, being under a peremptory undertaking to go to trial on the 10th of January, obtained the usual order to discontinue, on payment of costs, and a consent in case of non-payment to the defendant's signing a non pros. The defendant protested against the taxation, which was appointed for the 12th, and on that day obtained a rule absolute for judgment as in case of a nonsuit:—Held, on motion to set aside this rule, that the rule to discontinue did not operate as a stay of proceedings, and that the defendant was not precluded from obtaining judgment as in case of a nonsuit. *Beeton v. Jupp*, 15 Law J., Ex. 120.

*After a reference of a cause judgment cannot be moved for.]* At Nisi Prius the plaintiff and defendant agreed to a reference and the record was withdrawn:—Held, that the defendant could not afterwards have judgment as in case of a nonsuit; although by the default of the plaintiff the reference was delayed, and the agreement of reference never executed. *Hansby v. Evans*, 4 Mee. & W. 565; 7 Dowl. 198; 1 Horn, & H. 420; 3 Jur. 44; and *Clark v. Goldsmith*, 5 Bing. 120.

The defendant's remedy is to take down the cause for trial by proviso. *Ib.*

*In ejectment, motion for judgment as in case of nonsuit.]* The action of ejectment is within the stat. 14 Geo. 2, c. 17, enabling the defendants "in any action or suit at law" to obtain judgment as in case of a nonsuit. *Doe d. Berger v. Docker*, 6 Dowl. 478; 1 W. W. & H. 207; 2 Jur. 660.

Judgment as in case of a nonsuit may be obtained in an ejectment, if issue has been joined, although through the default of the lessor of the plaintiff no consent has been actually drawn up, the tenant in possession having appeared and pleaded. *Doe d. Williams v. Smith*, 9 Dowl. 1011.

*Pending a demurrer, motion for judgment as in case of nonsuit.]* The Court of Common Pleas will not entertain a motion for judgment as in case of a nonsuit pending a demurrer. *Butcher v. Kiernan*, 2 Marsh, 364.

Pending a demurrer the plaintiff is not bound to try the issue, and a rule for judgment as in case of a nonsuit will not be granted. *Gordon v. Smith*, 6 Bing. N. S. 273; 8 Scott, 560. This case was confirmed by the Court of Exchequer in *Brewer v. Pierpoint and others*, E. T. 1847.

*Pending demurrer, costs of the day.]* Where demurrers to certain of the defendant's pleas are pending, and the plaintiff gives notice of trial of the issues in fact, but does not proceed pursuant to his notice; the defendant is entitled to the costs of the day, but not to judgment.

as in case of a nonsuit. *Milton v. Griffiths*, 1 Dowl. N. S. 769; 6 Jur. 463, B. C.—Wightman, J.

After judgment for the defendant on demurrers to certain pleas, there may be judgment as in case of nonsuit against the plaintiff for not proceeding to trial upon other general pleas on which issues were joined. *Paxton v. Popham*, 10 East, 366; and *Martin v. Stone*, 6 Jur. 372, B. C.

*One of several defendants may move for judgment.]* One of several joint defendants may obtain a rule for judgment as in case of a nonsuit. *Jones v. Gibson*, 5 B. & C. 768; 8 D. & R. 592.

*Defendants separately appearing may severally move for judgment.]* Where there are several defendants, appearing by separate attorneys, they may each move for judgment as in case of a nonsuit. *Rhodes and another v. Thomas and others*, 2 Dowl. & L. 553, Q. B.

Where several defendants separately defend, any one of them may move for judgment as in case of nonsuit, notwithstanding one defendant had obtained a rule for the costs of the day, and another defendant a peremptory undertaking. *Bridgeford v. Wiseman*, MS., Exch. H. T. 1847.

One of several defendants, with whom issue has been joined a sufficient time to enable him to apply for judgment as in case of a nonsuit, cannot obtain such judgment if the proper period has not elapsed since issue joined with the other defendants also. *Crowther v. Brandon*, 7 Scott, 344; 8 Law J., C. P. 225.

*Judgment as in case of nonsuit where one defendant has suffered judgment by default.]* Where in an action of assumpsit one of two defendants suffers judgment by default, the other defendant is still entitled to judgment as in case of a nonsuit, for not proceeding to trial. *Stuart v. Rogers*, 4 Mee. & W. 649.

*Judgment as in case of nonsuit—form of rule where several defendants.]* Where there are several defendants in an action, a rule for judgment as in case of nonsuit, obtained by one of them, should be drawn up to show cause why the judgment should not be entered generally for the defendants. *Sawyer v. Hodges and Thomas*, 10 Law J., Ex. 470; 1 Dowl. N. S. 16, Ex.

*Motion by an insolvent defendant where the debt had been paid by another defendant.]* On a motion for judgment as in case of a nonsuit by one of several defendants, who it appeared was insolvent, and one of the other defendants had paid the debt which the plaintiff accepted in satisfaction: the court discharged the rule unless a stet processus be consented to. *Culshaw v. Meltzer and others*, MS., Exch. H. T. 1847.

*Defect of jury no ground for judgment as in case of nonsuit.]* Where a special jury cause is not tried, because neither party prays a tales, the defendant cannot have judgment as in case of a nonsuit. *Phillips v. Dance*, 4 M. & R. 584; 9 B. & C. 769.

*Cause withdrawn to obtain a special jury, excuse against motion for judgment.]* It is a sufficient excuse in showing cause against a rule for judgment as in case of a nonsuit, for not proceeding to trial pursuant to notice, that the cause was withdrawn in order to obtain a special jury. *Webber v. Roe*, 3 Dowl. 589.

*The last default only noticed on motion for judgment as in case of nonsuit.]* On a motion for judgment as in case of a nonsuit, the court only takes notice of the last default. *Jee v. Potter*, 4 Dowl. 724.

*Judgment as in case of nonsuit cannot be moved for, where a new trial is granted.]* Where the plaintiff tries his cause, and is nonsuited, and a new trial is granted, the defendant cannot move for judgment as in case of a nonsuit, though he may for costs for not proceeding to trial according to notice. *Doe d. Giles v. Wynne*, 1 Chit. 310.

Where a plaintiff was nonsuited, and the nonsuit was afterwards set aside on payment of costs:—Held, that defendant could not afterwards move for judgment as in case of a nonsuit, but must take down the cause by proviso. *Ashley v. Flaxman*, 2 Dowl. 697.

If a plaintiff has once taken his cause down to trial, although a new trial may be granted, and he has given fresh notice, pursuant to which he does not proceed, the defendant is not entitled to judgment as in case of a nonsuit. *Hawley v. Sherley*, 5 Dowl. 393; 2 Har. & W. 331.

*Where insolvency is the reason for not proceeding to trial.]* It is not enough to state in an affidavit, as a ground for discharging a rule for judgment as in case of a nonsuit, that the defendant is in insolvent circumstances; the affidavit must show that the plaintiff has not taken any further step in the cause, since he became acquainted with the defendant's insolvency. *Badman v. Pugh*, 1 Dowl. & L. 540, C. P.

*Rule for judgment as in case of nonsuit discharged after bankruptcy of plaintiff.]* Where the plaintiff became bankrupt after issue joined, the court discharged the rule for judgment, and refused to direct a stet processus. *Cross v. Robertson*, 8 Scott N. S. 346.

*Insolvency of plaintiff no answer to motion for judgment as in case of nonsuit.]* The insolvency of the plaintiff, after the commencement of the action, is not an answer to a motion for judgment as in case of a nonsuit. *Fordsham v. Rust*, 4 Dowl. 90.

On discharging a rule for judgment as in case of a nonsuit, where the plaintiff had become insolvent, and made an assignment of his property to trustees; the court required not only a good peremptory undertaking, but also that security should be found for the costs. *Nicholson v. Milne*, 1 Har. & W. 211.

And where the plaintiff's right of action became by his bankruptcy vested in his assignees, who refused to proceed in the suit; the court refused to discharge the rule for judgment as in case of a nonsuit, unless security were given for costs. *Taylor v. Montague*, 2 Mee. & W. 315.

*Poverty or insolvency of defendant is a reason for not proceeding to trial.]* Where the plaintiff neglected, after issue joined, to go down to trial, from the extreme state of poverty of the defendant:—Held, on motion for judgment as in case of a nonsuit, that the plaintiff was entitled to have the rule discharged, with costs, unless the defendant consented to enter a stet processus. *Lettice v. Sawyer*, 4 Jur. 74, Ex.

The insolvency of the defendant having happened since the action brought is a good cause against judgment as in case of a nonsuit. *Bailly v. Wilkinson*, 2 Doug. 671. And a rule for judgment will be discharged with costs unless a stet processus be accepted. *Holland v. Henderson*, 4 Mee. & W. 587; 1 Horn, & H. 469.

Where it did not appear distinctly that the defendant's insolvency became known to the plaintiff since the commencement of the action:—The court refused ordering a stet processus, but granted the rule for a peremptory undertaking. *Smith v. Davis*, 9 Dowl. 50; 2 Scott N. S. 189.

Where a defendant, who had filed his schedule under the Insolvent Act, and inserted the plaintiff's claim in it, afterwards applied for judgment as in case of a nonsuit against the plaintiff for not proceeding to trial; the court discharged his rule with costs, though it did not appear whether or not the plaintiff knew of the insolvency before he commenced his action. *Featherstone v. Bourne*, 12 Law J., Q. B. 102.

Where it was sworn in answer to a rule for judgment, as in case of a nonsuit, that the defendant was insolvent, but it did not appear that the plaintiff was unaware of the insolvency when he brought the action, the court directed the rule to be discharged, unless the defendant consented to a stet processus. *Lemon v. Hopson*, 6 Dowl. 795.

Where the defendant became bankrupt after service of a rule for judgment as in case of nonsuit, on cause being shown the court discharged the rule with costs, unless the defendant would consent to a stet processus. *Ferguson and another v. Bates*, MS. Exch. T. T. 1847.

But being informed by the neighbours and believing defendant to be insolvent is not sufficient. *Sykes v. Amor*, 6 Mee. & W. 814; and *Maun v. Williamson*, 7 Mee. & W. 145.

*Reference to issue on motion for judgment as in case of nonsuit.]* The issue cannot be looked at on a motion for judgment as in case of a nonsuit, unless it is referred to in the affidavit. *Meredith v. Stocker*, 4 Dowl. 499; *Tyrw. & G.* 76.

*Pending an order for particulars, judgment cannot be moved for.]* The defendant cannot obtain judgment as in case of a nonsuit, after having served the plaintiff with an order for further and better particulars, although the plaintiff has taken no notice of such order. *Wilkie v. Gipson*, 7 Law J., C. P. 65.

*If plaintiff withdraws record after being a remanet by consent, defendant may move for judgment, &c.]* Where, after issue joined and notice of trial given for the sittings after Easter term, the cause was made a remanet by consent to the sittings after Trinity term, when

the plaintiff withdrew the record:—Held, that the defendant was entitled to move for judgment as in case of a nonsuit. *M'Intyre v. Somers*, 14 Mee. & W. 102; 2 Dowl. & L. 896.

But in the Queen's Bench it has been held, where a cause has been once taken down and made a remanet, the defendant cannot afterwards have judgment as in case of a nonsuit, although the plaintiff may have again given notice of trial and not proceeded. *Gilbert v. Kirkland*, 2 Dowl. 153, B. C.

And in the Exchequer that judgment, as in case of a nonsuit, cannot be moved against a plaintiff who has once taken his cause down to trial, though it took place before the sheriff, under the Writ of Trial Act, and that the proper course is to get a judge's order for trying the cause by proviso. *Day v. Day*, 1 Mee. & W. 39; 4 Dowl. 740.

*A remanet from one sitting to another and default then made.]* Where a cause in London was made a remanet, from the sittings after Easter to the sittings after Trinity term, and the plaintiff then made default:—Held, that the defendant was entitled to move for judgment as in case of a nonsuit. *Ham v. Gray*, 6 B. & C. 125; 9 D. & R. 125.

*Judgment in case of a nonsuit—remanet.]* Where a town cause was made a remanet, from the sittings after Easter term to the sittings after Trinity term, and the plaintiff then made default, a rule for judgment as in case of a nonsuit made in Michaelmas term was discharged on a peremptory undertaking. *Ladbroke and others v. Williams*, 15 Law J., Q. B. 46; 3 Dowl. & L. 368.

*Motion for judgment may be made although notice of trial has been given sooner than necessary.]* Where a plaintiff gives notice of trial sooner than he need, he is bound to proceed to trial pursuant to the notice, or the defendant may move for judgment as in case of a nonsuit, in the following term. *Howell v. Powlett*, 1 Dowl. 263; 1 M. & Sc. 355; 8 Bing. 272; and *Ney v. Husband*, 5 M. & W. 493.

*Motion for judgment as in case of nonsuit, on issue under the Tithe Commutation Act.]* A defendant is entitled to judgment as in case of a nonsuit where more than two assizes have elapsed since issue joined on a feigned issue under the Tithe Commutation Act (6 & 7 Will. 4, c. 71, s. 46), and in such case the court will make an order for costs. *Sandys, Clerk, v. The Mayor, &c. of Beverley*, 1 Dowl. & L. 641, Ex.

*Motion for judgment, &c. in a feigned issue under Tithe Commutation Act.]* A feigned issue under the 6 & 7 Will. 4, c. 71 (Tithe Commutation Act), is not within the same rules of practice as actions at law, and therefore when the plaintiff fails to proceed promptly to trial on such an issue, the defendant cannot obtain judgment as in case of a nonsuit; but must make the delay of the plaintiff the subject of a special application to the court. *Wick v. Cotton*, 1 Dowl. & L. 227, Q. B.

*Judgment, &c. cannot be moved because notice of trial is not given in a special jury cause for the sittings after Easter term.]* In a special jury cause the plaintiff made default in not proceeding to trial at the

sittings after Hilary term: in Easter term the defendant obtained a rule for costs of the day, and no fresh notice of trial having been given in Trinity term, moved for judgment as in case of a nonsuit:—Held, that it was a sufficient cause for not proceeding to trial, that special jury causes are not tried at the sittings after Easter term. *Doe d. Jordan v. Templeton*, 1 Dowl. & L. 194, Q. B.; 12 Law J., Q. B. 331.

*Judgment as in case of nonsuit cannot be moved for, pending a commission to examine witnesses.]* The record having been withdrawn, an order was afterwards obtained by the defendant for a commission to examine witnesses, by which it was ordered that the trial should be postponed until after the return of the commission. On motion for judgment as in case of a nonsuit, after the making of the order, and before the return of the commission, it was held that defendant had waived his right to such judgment. *Waddy v. Barnett*, 15 Law J., Q. B. 8.

*Pending the return of commissions to examine witnesses, plaintiff not bound to enter into peremptory undertaking, &c.]* After the time when the defendant might have moved for judgment as in case of a nonsuit, the plaintiff, and shortly afterwards the defendant also, obtained orders for the issuing of commissions to examine witnesses in France, and postponing the trial until such commissions had been returned:—Held, that the defendant had waived his right to move for judgment as in a case of nonsuit, and consequently he could not call upon the plaintiff for a peremptory undertaking. *Bordier v. Burnett*, 10 Jur., Q. B. 35, B. C.—Patteson, J.; 3 Dowl. & L. 370; 15 Law J., Q. B. 8.

*Judgment as in case of nonsuit may be moved for in the same term as default made where there has been a peremptory undertaking.]* Where a plaintiff has given a peremptory undertaking to try at a particular sittings in term, and he has allowed those sittings to pass without giving notice of trial, judgment absolute may be obtained in the same term. *Ashton v. Johnson*, 8 Dowl. 299; 4 Jur. 172, B. C.

*A plaintiff under a peremptory undertaking must try within the time specified.]* The plaintiff having entered into a peremptory undertaking to try within two months in the sheriff's court, and no court having been held on the last court day before the expiration of the two months, it was held to be irregular in the plaintiff to proceed to try on an ensuing court day. *Bushell v. Slack*, 10 Jur. 947, B. C.; 16 Law J., Q. B. 3.

*Motion for judgment as in case of nonsuit after peremptory undertaking—special jury.]* On a motion for judgment as in case of nonsuit after a peremptory undertaking to try, the plaintiff obtained a rule for a special jury, thereby preventing the cause from being tried at the sittings after Easter term. The court held, that whether or not the making a cause a special jury is a default within the statute will depend upon whether or not it is a reasonably proper cause to be tried by a special jury. *Twysden v. Stultz*, 6 Scott, 434; and *Webber v. Roe*, 3 Dowl. 589, B. C.

*Agreement of reference after peremptory undertaking.]* In Michaelmas term, a peremptory undertaking was given to try at the next assizes. After the assizes, and before the ensuing term, both parties agreed to a reference. The arbitrator omitted to make his award within the time limited :—Held, that the peremptory undertaking was put an end to by the agreement of reference. *Spurr v. Rayner*, 7 Dowl. 467.

*After peremptory undertaking, proceedings stayed by defendant, for security for costs.]* A rule for judgment as in case of a nonsuit being discharged on a peremptory undertaking, the defendant afterwards obtained an order for staying the proceedings until security for costs were given, the plaintiff having become bankrupt; this order having been set aside the defendant then applied for judgment as in case of nonsuit, the plaintiff not having tried pursuant to the peremptory undertaking :—Held, that the defendant having himself stayed the proceedings in obtaining the order for security for costs he was not entitled to judgment as in case of nonsuit. *Gandell v. Motte*, MS. Exch. T. T. 1847.

*Motion for judgment as in case of nonsuit after peremptory undertaking.]* A rule for judgment as in case of a nonsuit after a peremptory undertaking and default, is absolute in the first instance.

After default in peremptory undertaking to proceed to trial in the Sheriffs' Court, a rule for judgment, absolute in the first instance, may be obtained. *Willis v. Oakley*, 6 Dowl. 766.

Where a plaintiff has given a peremptory undertaking (but not by a rule), the rule for judgment, as in case of a nonsuit, for not fulfilling that undertaking, is nisi in the first instance. *Vokins v. Snell*, 2 Dowl. 411.

The court will not make the rule for judgment as in case of a nonsuit absolute in the first instance, on the ground of the plaintiff having voluntarily made a promise to try peremptorily at a certain time, and of his having violated such promise. *Allnats v. Evans*, 5 Law J., C. P. 337.

*Motion for judgment as in case of nonsuit after peremptory undertaking.]* Where a rule for judgment as in case of a nonsuit is discharged on a peremptory undertaking, and the plaintiff omits to draw up the rule, the defendant is bound to draw it up, and serve it within the proper time, before he can avail himself of it. *Gingell v. Bean*, 1 Scott N. R. 153; 1 M. & G. 50; 4 Jur. 463; and *Sawyer v. Thompson*, 9 M. & W. 248; and *Knight v. Smith*, 7 Scott N. R. 896; 1 Dowl. & L. 912.

*Peremptory undertaking by husband and wife.]* Where in an action by husband and wife as executrix, a peremptory undertaking was given to try at a specified time, and the husband afterwards died :—Held, that the undertaking was not binding on the wife. *Lee v. Armstrong*, 9 Mee & W. 14.

*Peremptory undertaking—service of rule.]* Where a rule nisi for judgment as in case of a nonsuit is discharged on a peremptory un-

dertaking, either party may draw up the rule containing the undertaking, and if the defendant does so he must serve the plaintiff with it, to enable him to try according to the undertaking; and where the plaintiff gave a peremptory undertaking to try at the sittings after term, and on default a rule absolute was obtained for judgment as in case of a nonsuit, the court set aside that rule and all proceedings thereon for irregularity, the defendant not having served the plaintiff with the rule containing the undertaking until the first day of the sittings. *Sawyer v. Thompson*, 9 Mee. & W. 248; 1 Dowl. N. S. 449.

*[After peremptory undertaking any neglect to try will entitle defendant to judgment.]* The peremptory undertaking is in the nature of a condition to be responsible, although the plaintiff may have no control over the circumstances which may prevent the trial; where, after many evasions, he had strictly complied with the undertaking as to entering, &c., for trial, but at so late a period that from the pressure of business the cause was made a remanet, the court, under the circumstances, held it a neglect to try within the statute, and discharged the rule to set aside the judgment as in case of nonsuit. *Petrie v. Cullen*, 2 Dowl. & L. 604; 8 Scott N. S. 705; 14 Law J., C. P. 29.

*[The terms of a peremptory undertaking must be strictly observed.]* A rule for judgment as in case of nonsuit was discharged on a peremptory undertaking to try within two months, if an order to try before the sheriff should be obtained. After the expiration of the two months, the plaintiff gave a notice of trial before the sheriff, which the defendant returned as being too late. On the day for which the notice was given the cause was tried in the defendant's absence, and a verdict found for the plaintiff. The court set aside the verdict as irregular. *Negrete v. Martorell*, 6 Man. & G. 756; 1 Dowl. & L. 735.

*[Remanet after peremptory undertaking does not entitle defendant to judgment.]* The plaintiff having given a peremptory undertaking to try at the London sittings after Easter term, gave notice of trial accordingly, and entered the cause, which had been made a special jury cause, on the last day for entering causes for trial at those sittings, and the cause stood No. 20 in the list; but there being only two days for the sittings it was, with four others, made a remanet to the sittings after Trinity term:—Held, that under these circumstances the plaintiff was not in default, so as to entitle the defendant to judgment as in case of a nonsuit for not proceeding to trial pursuant to his undertaking. *Lumley v. Dubourg*, 14 Mee. & W. 295; 3 Dowl. & L. 80.

*[Default after peremptory undertaking—absence of material witness.]* Where the plaintiff entered a cause for trial at the sittings at which he was under a peremptory undertaking to try, but was prevented from trying on account of the absence of a material witness, the court discharged a rule which had been granted absolute for judgment as in case of a nonsuit, and enlarged the peremptory undertaking, although it appeared that the cause had been, in fact, struck out of the list,

on account of the record having been improperly entered. *Rogers v. Vandercom*, 15 Law J., Q. B. 313; 10 Jur. 1035; and *Colley v. Selby*, 11 Jur. 332, Q. B.

*Enlargement of peremptory undertaking.]* Where the venue in two actions had been changed at the instance of the defendants, on the ground that the same question was involved in both, and one was tried, but a verdict being found for the defendants, the record in the other action was withdrawn, and a rule nisi for judgment as in case of nonsuit which had been obtained therein was discharged on a peremptory undertaking; a rule nisi for a new trial having been obtained in the first action, but being still pending, a rule to enlarge the peremptory undertaking (moved for before the time limited for trial) was under the circumstances made absolute, on the terms of the plaintiff's paying the costs of the day for not proceeding to trial. *Rose and another v. The Port Talbot Company*, 15 Law J., Q. B. 316.

In support of a rule to enlarge a peremptory undertaking, where the plaintiff has made only one default, in consequence of the absence of a material witness, the affidavit need not state the name of that witness. *Montford v. Bond*, 2 Dowl. 403.

Where a plaintiff has made several defaults in fulfilling his undertaking to proceed to trial, the court will make him pay the costs of the last application to enlarge his peremptory undertaking. *De Rutzen v. John*, 5 Dowl. 400.

Where the plaintiff has made several defaults in proceeding to trial pursuant to his peremptory undertaking, the court may make the payment of the costs of the last default a condition precedent to enlarging his last undertaking. *Dennehaye v. Richardson*, 4 Dowl. 564.

Where, in an action for a libel, a peremptory undertaking to try was enlarged, and just before the cause was called on at the sittings after Trinity term, the senior counsel for the plaintiff left the court, upon which the plaintiff's attorney being taken by surprise, and obliged to act on the emergency, withdrew the record: the court, in Michaelmas term, enlarged the peremptory undertaking to try, till the sittings after that term. *Peirce v. Williams*, 1 T. & G. 220.

A plaintiff who had given a peremptory undertaking to go to trial, discovered afterwards that his case involved precisely the same point as *Hooper v. Lamb*, pending in the Exchequer Chamber, relative to the liability of persons connected with railway companies:—Held, that the peremptory undertaking ought to be enlarged until that case is disposed of by the court above, but that the defendant should be at liberty in the mean time to try the cause by proviso. *Lewis v. Betteridge*, 11 Jur. 490.

*After new trial granted defendant took down record by proviso—trial put off on peremptory undertaking.]* Where upon a new trial granted, the defendant took down the cause by proviso, and the plaintiff obtained an order to put off the trial to the next assizes upon giving a peremptory undertaking to try then:—Held, that being a bargain between the parties, it was not necessary to make the order a rule of court; and upon the plaintiff failing to try according to his undertaking, the court granted judgment as in case of nonsuit. *Jones v. Pritchard*, 2 Tyrw. 383.

*Setting aside rule for judgment as in case of nonsuit.]* Where the rule had been obtained for judgment as in case of nonsuit, and judgment signed, the court refused an application to set aside the rule, on the ground of having been moved contrary to an express understanding between the plaintiff's attorney and the defendant's counsel, at an accidental interview. *Richardson v. Peto*, 9 Dowl. 73, Q. B.

*Motion for judgment as in case of nonsuit where writ of trial is ordered.]* Where issue was joined on the 20th June, and notice given for trial at the sheriff's court on the 18th July, which the plaintiff countermanded:—Held, that a motion in the term next following for judgment as in case of a nonsuit was not too early. *Maddeley v. Baity*, 3 Dowl. 205.

Issue joined in a town cause in Hilary vacation on the 2nd February, and an order obtained on the 3rd, to try before the sheriff:—Held, that it was too early to apply for judgment as in case of a nonsuit in the following Easter term, although several sheriffs' court days had passed since the order was obtained. *Stacey v. Jeffrys*, 5 Dow. 524; 1 W. W. & D. 184.

Where a plaintiff obtains an order under the 3 & 4 Will. 4, c. 42, s. 17, for the trial of an issue before the sheriff, the court will compel him to proceed within a reasonable time. *Mullins v. Bishop*, 2 Dowl. 557.

Where a plaintiff does not proceed to the trial of an issue before the undersheriff, pursuant to notice, the time at which he would be compelled to proceed by the court will be regulated by the time at which the sheriff sits. *Banks v. Wright*, 3 Dowl. 14.

The rule as to the time for moving for judgment as in case of nonsuit is the same in cases to be tried before the sheriff as in those at Nisi Prius. *Harrison v. Jones*, 11 Mee. & W. 105.

**MOTION FOR JUDGMENT AFTER MOTION FOR COSTS OF THE DAY—RULE.]** No motion for judgment, as in case of a nonsuit, shall be allowed after a motion for costs for not proceeding to trial for the same default; but such costs may be moved for separately, i. e., without moving at all for judgment, as in case of a nonsuit, or after such motion is disposed of; or the court, on discharging a rule for judgment, as in case of a nonsuit, may order the plaintiff to pay the costs of not proceeding to trial; but the payment of such costs shall not be made a condition of discharging the rule. Reg. Gen. H. T. 2 Will. 4.

*Motion for judgment after costs of the day.]* Issue was joined in a town cause in Michaelmas term, and notice of trial given for the second sittings in that term; the cause was in the paper of those sittings, but went over to the sittings after term. The plaintiff then withdrew the record. In Hilary term the defendant moved for and obtained the costs of the day:—Held, that the defendant might move for judgment as in case of a nonsuit in Trinity term. *Smith v. Pole*, 5 Mee. & W. 491; 7 Dowl. 792; 9 Law J., Ex. 17.

*Judgment cannot be moved for after costs of the day until fresh default.]* A defendant who has obtained a rule for the costs of the day

cannot move for judgment, as in case of a nonsuit, until after a fresh default. *Johnstone v. Friedman*, 2 M. & G. 432.

*After costs of the day, and another default, judgment may be moved for.]* If, after a motion for the costs of the day for not proceeding to trial, the plaintiff suffers another term to elapse without giving notice of trial, that is a new default which entitles the defendant to move in the next term for judgment as in case of a nonsuit. *Dyke v. Edwards*, 2 Dowl. 53.

## JURY.

*By Reg. Gen. H. T. 1 Vic., no rule for a special jury can be granted on behalf of any defendant (or plaintiff in replevin), except on an affidavit, either stating that no notice of trial has been given, or, if it has been given, then stating the day for which such notice has been given; and, in the latter case, no such rule is to be granted, unless such application is made for it more than six days before that day, provided that a judge may, on summons, order a rule for a special jury to be drawn up at any time.*

*Special jury—defendant's rule.]* The court will not discharge the rule for a special jury, upon a suggestion that it has been obtained for the mere purpose of delay, and that the defendant has no real defence. *Bull v. Pinkers*, 5 Scott, 617.

The defendant, after notice of trial, served a rule for a special jury on 31st January, and the cause stood for trial in July. The defendant not having struck his jury;—the court discharged the rule, but without costs. *Andrews v. Thornton*, 8 Bing. 64; 1 M. & Sc. 139.

If a defendant, for the purpose of delay, obtains a rule for a special jury, the court will permit him to have it tried by such a jury, but will compel him to try it in its order, pursuant to the notice of trial, although on the day when the usual practice is not to take special juries. *Bush v. Pring*, 9 Dowl. 180, B. C.

If the defendant fail to summon the special jury in time, the cause may be tried by a common jury. *Archer v. Bamford*, 1 C. & P. 64.

A party who obtains a rule for a special jury is bound to use due diligence for their attendance. *Chuck v. Harris*, 2 Scott N. S. 82; 1 M. & G. 940.

The usual rule having been obtained for a special jury by the defendant, a judge at chambers, upon the statement of the plaintiff's attorney, without affidavit, ordered a special jury to be struck next day. The court refused to set aside that order as being irregular. *Joseph v. Perry*, 3 Dowl. 699, Ex.

The defendant had obtained a rule for a special jury, after the cause (entered as a common one) had been twice called on, late in the day, and postponed. The court, on terms, allowed the defendant to retain his rule for a special jury. *Thorne v. Marquis of Londonderry*, 8 Bing. 26; 1 M. & Sc. 62.

*Special jury—tales prayed.]* If any of the jurors appear, either party may then pray a tales, and the cause must then proceed. *Snook v. Southwood*, R. & M., 429; and *Gatliffe v. Bourne*, 2 M. & Rob. 100.

Semble, that in an information at the suit of the Attorney-General,

a tales may be prayed for the crown without his warrant, though he be not present, but not for the defendant. *Attorney-General v. Parsons*, 2 Mee. & W. 28.

Under 7 & 8 Will. 3, c. 32, s. 3, talesmen can only be taken from such persons as are summoned as jurors, and not from the bystanders; nor can the judge at Nisi Prius order other jurors to be summoned. *Rex v. Hill*, 1 C. & P. 667.

Nor can jurors summoned on the crown side serve as talesmen in civil issues. *Rex v. Tippling*, 1 C. & P. 668.

*Special jurors not appearing.]* If none of the special jurors appear the cause cannot be tried except by consent. Where the plaintiff proposed to have the cause tried by a common jury, which was allowed by the judge, notwithstanding the defendant's protesting against it, and a verdict was found for the plaintiff; the court set aside the verdict, although it appeared that the defendant had made defence at the trial. *Holt v. Meudlowcroft*, 4 M. & Sc. 467.

If a cause go off for default of special jurors, no new jury can be struck, but the cause must be tried by the jury first appointed. *Rex v. Perry*, 5 T. R. 453; but see *Mayor of Doncaster v. Coe*, 3 Taun. 404.

*Rule for special jury, when to be obtained.]* The statutes regulating juries, as well as the practice of the court, require that no rule for a special jury should be obtained before issue joined. *Sayer v. Ducroix*, 16 Law J., Q. B. 120.

*Service of rule for special jury.]* Where notice of trial had been given for the 16th, and on the 9th a rule for a special jury was obtained, but not served till the 13th; but owing to the intervention of Easter no jury could have been struck before the 15th, if the rule had been served on the day on which it was obtained; the court refused to set aside the rule for the special jury. *Gurney v. Gurney*, 3 Dowl. & L. 734; 15 Law J., Q. B. 265.

*Jury process to the sheriff.]* The jury process must be sent to the sheriff, in the case of common jurors, ten days, and in the case of special jurors, three days at the least, before the commission day at the assizes. *Charlton v. Burfitt*, 1 M. & Sc. 450.

Where the defendant obtained a rule for a special jury on the 11th January, but did not serve it till the 15th, after notice of trial had been given; the court, on motion, discharged the rule. *Phelps v. Keily*, 11 Law J., C. P. 99.

*Special jury on writ of inquiry before the sheriff.]* Where it appears that a common jury is improper to assess damages on a writ of inquiry before the sheriff, the court will direct the sheriff to summon a jury, to be taken from the special jury book. *Price v. Williams*, 5 Dowl. 160.

*Jury discharged by consent.]* Discharging a jury by consent does not terminate the suit, but is the same in this respect as withdrawing a juror. And where the plaintiff, instead of going on with such suit, brought a new action for a cause admitted to be the same, the court

stayed the proceedings, but would not grant the defendant his costs of the latter suit. *Everett v. Youells*, 3 B. & Ad. 349; and *Moscati v. Lawson*, 4 Ad. & E. 331.

Where judgment passed for the plaintiff to a demurrer to one plea, and the cause was taken down for trial upon another, and a juror was then withdrawn by consent:—Held, that the plaintiff could not obtain the costs of the demurrer. *Burdon v. Flower*, 7 Dowl. 786.

*A juror withdrawn by consent is a stay of further proceedings.]* If at the trial of a cause, a juror be withdrawn under the advice of counsel, and a second action brought for the same cause, the court will stay the proceedings, notwithstanding the belief of the attorneys on each side that such withdrawal would not operate as a termination of the suit. *Gibbs v. Ralph*, 14 Mee. & W. 804; 15 Law J., Ex. 6.

*Jury discharged by the judge—costs.]* If a judge of his own authority discharges a jury from giving a verdict, on the ground of their not being able to agree, the party ultimately successful will not be entitled to the costs of the first attempt at trial. *Seely v. Powers*, 3 Dowl. 372.

*Special jury—banking company—striking out names of shareholders.]* In a seire facias by the trustees of a banking company, against a shareholder of another banking company, founded on a warrant of attorney given to the trustees of the former by the public officer of the latter, the plaintiffs having obtained a rule for a special jury, and a rule having been granted calling on the plaintiffs to show cause why they should not furnish to the defendant a list of the names and residences of the shareholders of the company, that they might not be nominated as jurymen, or why the rule for a special jury should not be discharged; the court afterwards, on showing cause, discharged the defendant's rule, on the plaintiff's undertaking to strike out of the list of forty-eight nominated for the jury any one who happened to be shareholders in the company; the sheriff to name any other persons, not shareholders, in lieu of those struck out. *Esdaile and others v. Lund*, 13 Law J., Ex. 191.

*Special jury—tales prayed—challenge to the array.]* On the trial at Nisi Prius of an indictment for libel, on which only three special jurors appeared, the counsel for the prosecution prayed a tales, and the defendant challenged the array of the tales, on the ground that the sheriff was a subscriber to a society who were prosecutors, and on issue taken on this challenge, two triers were appointed by the court, who found in favour of the challenge, and the cause was made a remanet. *Rex v. Dolby*, 1 Car. & K. 238.—Abbott, L. C. J.

*Special jury in an issue from Chancery—tales.]* Issues of devisavit vel non were directed by the master of the rolls, who ordered they should be tried by a special jury, but that none of the special jury should reside within twelve miles of G. (the assize town.) There was no order as to the talesmen, and only eight special jurors appeared. The plaintiffs' counsel prayed a tales; but the other party objected. The judge would not grant a tales, on the ground that there being no order of the master of the rolls as to the talesmen, and their residing

## MOTIONS.

within twelve miles of G., being no legal ground of challenge, the talesmen could not be asked on the voir dire as to their residences; and that, if any of them did reside within twelve miles of G., the master of the rolls would probably order a new trial on that ground. The trial, therefore, stood over till the next assizes. *Wood v. Thompson*, 1 Car. & M. 171.—Coleridge, J.

*Jury not allowed a law book cited.]* After the jury are charged, they can only state a question, and receive the law from the court; the court therefore refused to permit them to have a law treatise on the subject which had been cited. *Burrows v. Unwin*, 3 Car. & P. 310.

*Jury discharged in an undefended cause.]* The judge, in an undefended cause, where the plaintiff could not get on for want of a written agreement, discharged the jury, and allowed the record to be withdrawn, in order to save expense to the parties. *Bonsor v. Element*, 6 Car. & P. 230.

## MOTIONS.

*Notice of motion.]* Where a rule nisi is obtained for setting aside proceedings for irregularity, there can be no stay of proceedings, unless notice of the motion has been given to the opposite party. *Fortesque v. Jones*, 1 Dowl. 524.

In the Queen's Bench notice is not necessary, the above case having been overruled by *Stratton v. Regan*, 2 Dowl. 585.

But in the Exchequer a notice is necessary. *Smith v. Wheeler*, 3 Dowl. 431.

And so in the Common Pleas. *Rolfe v. Brown*, 1 Hodges, 27.

In the Exchequer a two days' notice is requisite. *Hannah v. Wyman*, 3 Dowl. 673.

*Notice of motion—computation of time.]* Where notice of a motion for the discharge of a defendant out of custody under the 48 Geo. 3, c. 123, was served on the 3rd June, and it was stated that the motion would be made on the 12th, or so soon as counsel could be heard (the rule of court requiring ten days' notice), the court held that the notice was insufficient, although the application was not made until the 14th June. *Burley v. Worrall*, 1 Dowl. & L. 145, Q. B.

*When motion must be made to correct an irregularity.]* Where a writ of fi. fa. was executed, and the amount of the levy paid under protest, on the 7th, a motion on the 20th November to set aside the proceedings, on the ground that the defendant had never been served with process in the action, was held too late. *Cook v. Peace*, 9 Jur. 227, B. C.—Patteson, J.

*Affidavits on motions.]* If a rule is moved without affidavits, none can be used in answer to it. *Atkins v. Meredith*, 4 Dowl., 658.

*Second application on same subject as had been discharged with costs.]* Where a rule for a mandamus, obtained by churchwardens, had been discharged, with costs, on the ground that their affidavits were imperfect, and a subsequent rule was obtained by the same parties, on the

same ground, on amended affidavits, the court refused to hear the second application upon the merits, and discharged the second rule also with costs. *The Queen v. Pickles and another*, 12 Law J., Q. B. 40; and *Levy v. Coyle*, 12 Law J., Q. B., 295; 7 Jur. 724; and *Rosset v. Hartley*, 5 N. & M. 415.

Where a rule had been disposed of, the court refused to re-open the question on a suggestion of new facts, not brought before the court, but known before the rule was obtained. *Bodfield v. Padmore*, 5 Ad. & E. 785.

The court refused to open a rule obtained before a single judge in the Bail Court in the term after the judgment pronounced, although with the sanction of the judge. *Todd v. Jeffery*, 2 N. & P. 443.

*A motion refused cannot be renewed on amended materials.]* Where a rule for a mandamus was discharged upon a preliminary objection that there had been no demand upon and refusal by the party against whom the mandamus was prayed, to do that which the mandamus directed, the court refused a second rule for the mandamus, founded on affidavits, showing a demand and refusal subsequent to the discharge of the former rule. *Ex parte Thompson*, 14 Law J., Q. B. 176.

The general rule of practice is, that a party failing in a motion by reason of a defect in his affidavit, shall not repeat his application on an amended affidavit, showing no ground of application which might not have been presented before.

The only exceptions which the court will generally admit are, where the amendment consists merely in correcting an error in the title or jurat of the affidavit. *Mayor of Maidenhead v. Great Western Railway Company*, 5 Q. B. Rep. 597.

If a party through his own neglect makes an application to the court on insufficient materials, and his rule is on that ground discharged, he cannot afterwards be allowed to supply the deficiency, and to renew his application. *Reg. v. Barton*, 9 Dowl. 1021.

*Rule discharged on defect in affidavit—motion renewed.]* Where a rule nisi for judgment, as in case of a nonsuit, was discharged in Hilary term, on the ground of a defect in the affidavit upon which it had been moved (for that it did not show whether the cause was a town or a country cause, and that it was not clear, therefore, that the plaintiff had been guilty of a default in not proceeding to trial), and a second rule obtained in the same term (in support of which an affidavit was produced supplying this defect) was also discharged upon the ground that it was a mere renewal of the former application upon amended materials, the court nevertheless held that the defendant was entitled to renew his motion in the following Easter term. *Withers v. Spooner*, 1 Dowl. & L. 17 C. P.

A mandamus was quashed on the ground that it was not drawn up in conformity with the rules under which it issued. A rule was afterwards obtained for amending the first-mentioned rules, so as to make them agree with the mandamus. This rule was discharged:—Held, that the prosecutor ought to be allowed to make a second application on the same affidavits for a rule for a mandamus in the terms of the first mandamus, though the object of such application was the same as that which was sought by the rule for amending the rules. *The*

*Queen v. The East Lancashire Railway Company*, 16 Law J., Q. B. 127.

*Second application to court on amended affidavits.]* The rule now acted upon in the Court of Queen's Bench appears to be, that, where a party fails in an application from a defect in his affidavits, he cannot have a fresh rule on amended affidavits, except only where the defect is merely in the jurat or title of the affidavit. *Reg. v. Manchester and Leeds Railway Company*, 8 Ad. & E. 413; *Joynes v. Collinson*, 13 Mee. & W. 560, note.

*Same plaintiff in two actions may move on same affidavit in both causes.]* A motion on behalf of the same plaintiff, in two different actions, upon the same ground of application may be made upon one affidavit, entitled in both actions. *Pitt v. Evans*, 2 Dowl. 226, Ex.

*Motion to amend the terms of a rule.]* Mistakes in the terms of rules may be amended on motion to open them, made within the same term, or perhaps that following; but where more time has elapsed, the affidavits which were used on the occasion of making the first rule absolute cannot be referred to in order to open it, unless the new motion is made, and the new rule drawn up on reading them. *Lord v. Hope*, 5 Tyrw. 487.

*The date of the judgment of the court on a motion relates to the time of the argument.]* The judgment of the court relates to the time of hearing the argument, and may be entered *nunc pro tunc*, against one of several defendants, as well as against a sole defendant, when death takes place after verdict, and before judgment. *Harrison and others v. Heathorn and others*, 1 Dowl. & L. 529, C. P.

*Application to re-hear a rule.]* The court refused to re-hear a rule upon a suggestion that it had been decided upon an erroneous report of the masters on a point of practice. *Gingell v. Beau*, 1 M. & G. 555; 1 Scott, N. R. 390.

*Application to the court after an application to a judge at chambers.]* Semble, that where an application has been made to a judge at chambers and refused, it is not necessary, in a subsequent application to the court, to bring before the court the proceedings at chambers. *Hallett v. Creswell*, 1 B. C. Rep. 1; 10 Jur. 266.

When parties who are before a judge at chambers, upon a summons, are referred to the court, they are bound to go promptly. *Butterworth v. Williams*, 1 B. C. Rep. 168—Wightman, J.

On the 10th March a summons was taken out to amend an entry in a judgment-roll, and was heard on the 12th, when the question was adjourned; no motion however was made until the 5th May (the 21st day of Easter term):—Held, too late. *Ib.*

*A case heard and dismissed at chambers may be moved in court.]* A party whose case has been heard at chambers and dismissed, may apply to the court to hear it, although no order has been made by the judge; and he is not precluded from using additional affidavits in sup-

port of his application. *Pike v. Davis*, 6 Mee. & W. 546; 9 Law J., Ex. 322; 8 Dowl. 387.

But where an application had been made in term to a judge at chambers to set aside an appearance entered sec. stat., and all subsequent proceedings, and refused by the judge, the court refused a rule on a motion, with additional affidavits, the defendant having elected to go to chambers in the first instance when he might have come to the court. *Florence v. Colverd*, MS. Exch. H. T. 1847.

*Motion to increase damages, when to be made.]* Held, that a motion to increase the damages, found by the jury upon a trial in the vacation, made after the first four days of term, is too late. *Masters v. Farris*, 1 C. B. 715.

## NEW TRIALS.

*Motion for new trial—within what time.]* The cause was tried the day before the last day of Easter term—the distringas returnable on the last day of that term. On the second day of the next Trinity term a motion was made for a rule nisi for a new trial, and the court held that the application was too late and refused the rule. *Hall or Cole v. Davis*, MS. Exch. T. T. 1844.

A rule for a new trial may be moved for within four days after the return day of the distringas juratorum, although more than four days may have elapsed since the trial. *Ames v. Lettice*, 6 Mee. & W. 216; 9 Law J., Ex. 312.

A motion for a new trial must be made within four days *inclusive* of the return day of the distringas. *Chapman v. Eley*, 11 Law J., C. P. 320.

*Motion for new trial on an objection to the notice of trial.]* The ground of an application for a new trial was, that the defendant's residence was and for some time had been in Ireland, and that he ought to have had fourteen instead of eight days' notice of trial. The court refused the rule; it not appearing that, whilst resident in London, he was not permanently resident there. *Leneham v. Gould*, 4 Dowl. 371, Ex.

*Motion for a new trial on the point of the right to begin.]* On a motion for a new trial, the court refused the new trial on the ground that the judge had erroneously decided on the trial as to the right to begin. *Bird v. Higginson*, 2 Ad. & E. 160.

In the Exchequer, on a similar motion, where the judge at Nisi Prius had decided clearly and manifestly wrong, the court granted a new trial. *Huckman v. Fernie*, 3 Mee. & W. 505.

Semblé, the court will not grant a new trial merely on the ground that a judge's ruling as to the right to begin is erroneous, unless clear and manifest wrong has been done thereby. *Booth v. Millres*, 15 Law J., Ex. 354; and *Edwards v. Mathews*, 11 Jur. 398, Ex.

Where injury has resulted from an erroneous decision of a judge at Nisi Prius, relative to the order of beginning, the court will, in its

discretion, grant a new trial. *Geach v. Ingall*, 14 Mee. & W. 95; 9 Jur. 691.

*On motion for a new trial, the judge's report cannot be contradicted.]* Affidavits are not receivable to show that a judge is mistaken in his report. *Rex v. Grant*, 5 B. & Ad. 1081; 3 N. & M. 106.

And where the notes on the briefs of the counsel on both sides differed from the judge's report as to the summing up, the Court of Exchequer held that they were bound by the judge's report, and refused to make the rule absolute for a new trial. *Jones v. Jones*, MS. Exch. H. T. 1847.

*Motion for new trial—challenge over-ruled at Nisi Prius.]* In order to enable a party to avail himself of a challenge to the array or the polls, as a matter of right, the challenge and ground for it should be put upon the record at the trial. Although in some cases the court will grant a new trial where a valid challenge has been made and over-ruled at Nisi Prius, and it has been omitted to be put upon the record, the court will not grant it where the party was aware of the cause of the challenge to the array before the trial, and might, by moving to change the venue, or otherwise, have obviated the objection. *The Mayor, &c. of Carmarthen v. Evans*, 11 Law J., Ex. 394.

*Motion for a new trial, plaintiff having amended his particulars.]* When the plaintiff, by amending his particulars, makes them inconsistent with the declaration and insensible, the court will not set aside a verdict obtained by him, unless the defendant was misled by the alteration, or had no opportunity of amending his pleadings. *Simons v. Wood*, 13 Law J., Q. B. 49.

*New trial moved for in the wrong court by mistake.]* A rule for a new trial having been moved for by mistake, in a wrong court, and the mistake not having been discovered till after the first four days of the term had elapsed, the Court of Exchequer, under the circumstances, allowed the motion to stand good as of that court. *Piggott v. Kemp*, 2 Dowl. 20.

*Reserved list of motions for rules for new trials.]* Where, from the pressure of business, a motion cannot be heard within the first four days of term, and the case is inserted in the list of enlarged motions, notice of that fact should be given to the opposite party, or he will be entitled to the costs of proceeding to sign judgment. *Emblin v. Dartnell*, 1 Dowl. & L. 1010; 13 Law J., Ex. 255; 12 Mee. & W. 830.

*Notice must be given after a case is inserted in the reserved list of motions for new trials.]* A cause having been put into the reserved list of motions for new trials to be moved after the fourth day of term, notice must be given to the opposite party after the cause has been inserted in the list,—it is not sufficient that the party has become acquainted with the fact by any other means. *Lloyd v. Berkovitz*, MS. Exch. M. T. 1846.

*Affidavits used on motion for new trial—when to be sworn.]* The

court refused to allow an affidavit to be used on motion for a new trial, where sworn after the four days allowed for moving for the new trial, although the motion not made until after that time. *Williams v. Mortimer*, 11 Mee. & W. 104; 12 Law J., Ex. 164.

*Affidavits used on motion for new trial, when to be filed.]* The court will not allow additional affidavits to be filed in support of a motion for a new trial, after the expiration of the time for moving. *Gibbs v. Tunaley*, 1 M. G. & S. 640.

*The new trial paper may be called on the last day of term.]* On the last day of Easter term, 1846, the court having gone through the bar, and the motions being exhausted, the first case in the new trial paper was called on at about two o'clock. *Lambert v. Heath*, 15 Law J., Ex. 296; and *Bold v. Wainwright*, 10 Jur. 396.

*Motion for new trial on the ground of an amendment at Nisi Prius.]* Where an amendment has been made at the trial, no new trial will be granted on that ground. *Ward v. Pearson*, 5 Mee. & W. 16; 7 Dowl. 382.

Nor where the judge at Nisi Prius refuses to grant the application. *Doe d. Poole v. Errington*, 1 Ad. & E. 750; 3 N. & M. 646; and *Berney v. Green*, 12 Moore, 174.

*Motion for new trial—no notice of trial given.]* Unless under very special circumstances, a defendant who appears at the trial of the cause, and takes his chance of success there, will not be allowed afterwards to avail himself of the objection, that he has received no notice of trial. *Figg v. Wedderburne*, 11 Law J., Q. B. 45.

*A cause tried by mistake as undefended no ground for new trial.]* On a motion for a new trial, it appeared that the attorney had permitted the cause through inattention to be called on, and tried as an undefended cause. The court refused to grant a new trial, although it was sworn that there was a good defence upon the merits. *Breuch v. Casterton*, 7 Bing. 224; 4 M. & P. 867.

A cause which was fifteenth on the list for the day, was taken on as an undefended cause, at the sitting of the court, and in the absence of the defendant:—Held, that there was no ground for a new trial, and that the judge may take the causes in the list in such order as he pleases. *Bauks v. Newton*, 16 Law J., Q.B. 142; 11 Jur. 208.

*Rule nisi for a new trial on bringing money into court.]* Where a rule nisi for a new trial is granted on the terms of bringing the amount of the verdict into court, the money must be brought in before the rule nisi is drawn up. *Clare v. Fiestel*, 2 Dowl. 617, Ex.

*New trial through default of jury—costs of first trial.]* A plaintiff who succeeds on a second trial is entitled to the costs of the first trial, in which no verdict could be given by reason of the absconding of one of the jurors, although the plaintiff refused to consent to a verdict by the other eleven. *Harrison v. Bennett*, 2 Law J., Ex. 38; 1 C. & M. 203.

*Rule nisi for a new trial, verdict under 20*l.*—new evidence.]* The rule, that the court will not grant a rule for a new trial on the ground that the verdict was against evidence, where the sum sought to be recovered is under 20*l.*, except in cases of fraud, extends to cases where the motion is made on the ground of the discovery of new evidence. *Branson v. Didsbury*, 10 Law J., Q. B. 10.

*Rule nisi for new trial—affidavits of witnesses on motion for.]* Upon an application to set aside the verdict, on the ground of excessive damages, this court refused to hear affidavits made by the defendant's witnesses, examined at the trial, either to explain or add to the evidence then given. *Phillips v. Hatfield*, 10 Law J., Ex. 33.

*New trial—miscarriage on part of the associate in taking the verdict.]* Upon the trial of a cause, in which three issues were raised, each going to the whole cause of action, it was agreed on both sides that the verdict should be taken by the associate in the absence of the judge, who, before he retired from the court, directed the associate to take the verdict upon each of the issues separately. Upon the return of the jury, the associate asked them whether they found for the plaintiff or the defendant; and the foreman answered "for the plaintiff." The defendant's counsel requested the associate to put the questions left to the jury by the judge, to which the plaintiff's counsel objected; whereupon the associate refused to put the questions, and ultimately a general verdict was entered for the plaintiff:—Held, that the neglect in not taking the verdict upon each of the issues was a miscarriage on the part of the officer of the court in taking the verdict; and the court, therefore, made a rule absolute for a new trial, without costs on either side. *Bentley v. Fleming*, 3 Dowl. & L. 23; 1 M. G. & S. 479.

*Negligence of attorney no ground for new trial.]* The court refused a new trial, merely on an affidavit that the defendant had been kept by his attorney in ignorance of the action; and that he had a good defence on the merits, but that the verdict had gone against him through the negligence of his attorney, the remedy being against the latter. *Moody v. Dick*, 4 N. & M. 11.

*New trial cannot be granted for one of several defendants.]* The court cannot on motion grant a new trial as to one defendant, where a verdict has been found against him, and for the other defendants. *Doe d. Dudgeon and another v. Martin and others*, 2 Dowl. & L. 678, Ex.

*Motion for new trial where verdict for one defendant and against others.]* Where a verdict has been found for one of several defendants, and against the others, and the latter apply to set it aside; the rule should call on the successful defendant, as well as the plaintiff, to show cause. *Belcher v. Magney and others*, 3 Dowl. & L. 70.

*Costs of rule for new trial if not paid—motion thereon.]* A rule to discharge a rule for a new trial, on the ground that the party has neglected to pay costs, is a rule nisi which makes itself absolute,

unless cause be shown within a limited time. *Phillips v. Warren*, 14 Mee. & W. 730; 3 Dowl. & L. 301; 15 Law J., Ex. 3.

The Court of Queen's Bench will grant a rule absolute in the first instance. *Champion v. Griffiths*, 1 Dowl. N. S. 319.

*Costs of new trial—costs in the cause.]* A new trial had been granted without mention of costs, and shortly before the cause was to be again tried, an order was made to stay further proceedings on payment of 20*l.* damages, and all such costs already incurred as plaintiff would have been entitled to if he had gone to a second trial and obtained a verdict. The master allowed, on taxation, the costs of the briefs delivered, and the fees paid to counsel on the first trial, and the costs of the subpœnas, and of the copies and service thereof upon the witnesses at the first trial. No briefs had been delivered or witnesses subpœnaed for the second trial at the time the order was made:—Held, that the fees to counsel and the costs of serving the subpœnas were wrongly allowed, as those costs alone which would be available at the second trial ought to have been allowed as costs in the cause. *Lambert v. Lyddon*, 16 Law J., Q. B. 34.

*Rule for a new trial—costs to abide the event.]* Upon granting a new trial, costs to abide the event, the Court of Exchequer said, they would follow the rule in the King's Bench, that neither party have the costs of the first trial, unless the verdicts are for the same party. *Canham v. Fisk*, 2 C. & J. 126; 2 Tyrw. 155; and *Pasley v. Mellard*, 1 Tyrw. 160.

*Costs of rule for a new trial.]* Where the plaintiff had obtained a verdict, and a rule was made absolute for a new trial, with costs to abide the event, but no mention was made of the costs of the rule, and the defendant succeeded on the new trial:—Held, that neither party was entitled to the costs of the rule, the term “costs to abide the event” meaning, in the event of the second verdict being the same as the first. *Eccles v. Harper*, 14 Mee. & W. 248; 14 Law J., Ex. 264.

*A new trial granted on payment of costs—consequence of non-payment.]* A rule having been made absolute for a new trial on payment of costs by the plaintiff, the costs were taxed and demanded on the 4th of May. On the 8th of May, the defendant obtained a rule to discharge the rule for a new trial, unless the costs were paid before the fourth day of the ensuing term. The plaintiff having paid the costs on the 21st of May, the court discharged the rule, but ordered the plaintiff to pay the costs of the application. *Solly v. Langford*, 13 Mee. & W. 151; 2 Dowl. & L. 405, Ex.

*Costs of new trial, on reference, after new trial granted.]* After a verdict for the plaintiff, the defendant obtained a rule for a new trial, which was made absolute, no mention being made of costs. The parties then agreed to a reference, and the order of reference stipulated that the costs were to abide the event. The arbitrator having decided the cause in favour of the defendant:—Held, that the defendant was not entitled to the costs of the trial. *Thomas v. Hawkes*, 9 Mee. & W. 53.

*Rule for a new trial—costs of former trial.]* Where a rule for a new trial is silent as to costs, the plaintiff is not entitled to the costs of the first trial. *Peacock v. Harris*, 1 N. & P. 240

Where nothing is said as to costs upon a new trial granted, the court cannot give them to the successful party. *Newberry v. Colvin*, 2 Dowl. 415, B. C.

Where a *venire de novo* is awarded, the successful party is not entitled to the costs of the first trial. *Edwards v. Brown*, 1 C. & J. 354; 1 Tyrw. 281.

*Rule for new trial—costs of former trial to abide the event.]* Where, after a verdict for the plaintiff, a new trial was directed upon the terms of the costs of the former trial to abide the event, the defendant having obtained the verdict in the second trial:—Held, that he was entitled only to the costs of the new trial. *Sherlock v. Bernard*, 8 Bing. 21; 6 M. & P. 58.

*Costs in the cause, on new trial granted.]* Fees of counsel on a first trial, consultation fees, and the service of subpoenas for the first trial, are not costs in the cause, on the principle that they would not be available for a second trial. *Lampert v. Lyddon*, 11 Jur. 44, Q. B.

*New trial—taxation of costs.]* Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the master, in taxing costs, may allow fees on the second trial with reference to those given on the first. *Wilkinson v. Malin*, 2 Dowl. 65, Ex.

*New trial, jury not agreeing, costs.]* Where the jury not agreeing, are discharged by the judge of his own authority, the party ultimately successful is not entitled to the costs of the first attempt at trial. *Waite v. Spurgin*, 4 Dowl. 575, B. C.

Nor where a juror is withdrawn on the first trial. *Thomas v. Lewis*, 5 Dowl. 395.

*New trial on payment of costs—when to be paid.]* In the Court of Queen's Bench, if a trial has been granted on payment of costs, the court will not point out in the rule a particular day on which the costs must be paid. *Bland v. Warren*, 6 Dowl. 21, B. C.

*Rule for new trial abandoned, costs.]* The defendant had obtained a rule for a new trial, without mention of costs, and which was drawn up; it was afterwards abandoned. The court directed the plaintiff to have the postea delivered to him, and to have the costs of the trial; but refused the costs of the rule, and application for the postea and costs to plaintiff. *De Rutsen v. Lloyd*, 5 Ad. & E. 463; 2 N. & P. 213.

*New trial on payment of costs—taxation of costs.]* Upon a rule obtained for a new trial on payment of costs, the court held, that the costs of admitting documents used on the first trial were costs in the cause, there being no necessity for fresh admissions; but that the costs of preparing briefs and of full fees should be allowed as costs

of the trial, regard being had by the master to necessary amendments. *Lord v. Wardle*, 6 Dowl. 174; 3 Scott, 398.

Remanet fees were held to be costs taxable, and to be included by the master. *Robinson v. Day*, 2 N. & M. 670. This case is over-ruled by the following.

*A new trial granted on payment of costs does not include the costs of a remanet.]* Where a town cause is made a remanet, the costs so occasioned are costs in the cause, and need not be paid by a party who obtains a rule for a new trial on payment of costs. *Bentley v. Carver*, 15 Law J., C. P. 173.

*Rule for a new trial after a nonsuit—plaintiff discontinues—costs of trial.]* In trespass for mesne profits, the plaintiff was nonsuited, and obtained a rule for a new trial, which said nothing as to costs. He served this rule. Another action was afterwards commenced against the defendant for the same mesne profits, in the name of John Doe; upon which the defendant obtained a rule, which was made absolute, to stay the proceedings in this action, till the former should be determined, or discontinued. The plaintiff's attorney gave notice of trial, but afterwards countermanded it, in the action in which the new trial was granted; and the defendant's attorney also gave notice of trial by proviso, which was also countermanded. After the assizes, the plaintiff obtained a rule to discontinue, and served an appointment for taxation of costs:—Held, that the defendant was not entitled to the costs of the trial. *Joliffe v. Mundy*, 4 Mee. & W. 502; 8 Law J., Ex. 100.

*Rule for a new trial abandoned—plaintiff discontinued—costs of trial.]* Where after verdict for the plaintiff, a new trial was granted, but no mention of costs, the plaintiff discontinued:—Held, the defendant was not entitled to costs. *Gray v. Cox*, 5 B. & C. 458; and *Sweeting v. Halse*, 9 B. & C. 369.

*Statements of jurors not admissible on motion for new trial.]* Though the affidavits of individual jurors are not, on grounds of public policy, receivable to impugn their own verdict, yet the affidavits of persons within hearing are admissible to give the court that information which cannot be derived from a party implicated. *Harvey v. Hewitt*, 8 Dowl. 598.

*Affidavit of juror where receivable.]* Where personal misconduct has been imputed to jurors by affidavits, upon which a rule nisi for a new trial has been obtained, the affidavits of the jurors themselves are admissible, in showing cause to rebut that imputation. *Standwick v. Hopkins*, 14 Law J., Q. B. 16; 2 Dowl. & L. 502.

And affidavits of jurors of what occurred in open court, on the delivery of their verdict, are receivable on a motion for a new trial. *Roberts v. Hughes*, 7 Mee. & W. 399; 10 Law J., Ex. 337.

*Motion for new trial—affidavit of a juryman.]* The judge being of opinion that the plaintiff had made out no title, directed a verdict for the defendant; and the jury being present, and no objection made at

the time of entering the verdict, the court refused an application for a new trial, on the affidavit of a juror that he had not concurred in the verdict. *Saville v. Lord Farnham*, 2 M. & Ry. 216.

On a motion for a new trial the court will not receive an affidavit by an attorney of an admission made to him by one of the jurymen that the verdict was decided by lot. *Straker v. Graham*, 4 Mee. & W. 721; 7 Dowl. 223.

*Misconduct of the jury a ground for a new trial.]* Where a jury have misconducted themselves in their demeanour during the trial in such a way as to lead to the presumption that justice had not been properly administered, the court will grant a new trial. *Hughes v. Budd*, 8 Dowl. 315, Q. B.

So the court would grant a new trial in a case where a juror had, before being sworn, declared his determination as to the verdict he should give. *Ramadge v. Ryan*, 9 Bing. 333.

*Motion for new trial on the affidavit of misconduct of a jury.]* The court will not set aside a verdict upon the ground of the misconduct of a jury, upon affidavit of a statement made by one juror in the presence of his fellows in open court immediately after the delivery of the verdict, and not denied by any of them, which was, that the jury being equally divided in opinion, their names had been put into a hat, and the name of one being drawn forth by the foreman, his vote had been transferred to the side of those from whom he differed in opinion, and that the verdict had been determined by the majority thus created. *Burgess v. Langley*, 1 Dowl. & L. 21, C. P.

*Motion for new trial—observations by judge at Nisi Prius.]* Semble, if in a cause at Nisi Prius the judge, before the jury are sworn, but in the hearing of the persons summoned to compose it, makes observations calculated to prejudge the case, and, on being requested to postpone the trial on account of the probable effect of those observations, refuses to do so, a new trial ought to be granted.

A judge under such circumstances made some observations to the defendant's counsel which might have been understood as calculated to prejudge the defendant's case. The defendant's counsel thereupon protested and asked for a postponement of the trial in order that another jury might be struck; and on this being refused withdrew from the cause, which was then tried in his absence and a verdict given against his client.

The court set aside the verdict on terms, although six of the jury swore and five more were sworn to have stated that their minds were not prejudiced by what fell from the judge; and one swore that he believed it had no effect on the minds of his fellow jurors.

Semble, that it is ground for putting off a trial that observations calculated to prejudge the case have been made by third parties, in newspapers or otherwise.

Semble, that the court will grant a new trial if they think that a motion for a postponement of the trial has been improperly refused by the judge at Nisi Prius. *Golding v. Beagin*, 11 Jur. 544.

*Rule absolute for new trial not discharged because plaintiff does not*

*proceed to second trial.]* The court will not discharge a rule that has been made absolute for a new trial, on the ground of the plaintiff having delayed to bring the cause to a second trial. The defendant's remedy is to take down the record by proviso. *Earl of Harborough v. Shardlow*, 10 Law J., Ex. 320.

*Rule absolute for new trial discharged.]* A motion to discharge a rule absolute for a new trial on payment of costs, upon default made, is a rule nisi, making itself absolute unless cause shown within the time limited by the rule. *Phillips v. Warren*, 14 Mee. & W. 730; 3 Dowl. & L. 301; 15 Law J., Ex. 3.

*Motion for new trial on an issue from Chancery.]* On issues out of Chancery, the motion for a new trial ought first to be made in that court. *Stone v. March*, 8 D. & R. 71, K. B.

*Motion for new trial in a Common Pleas at Lancaster cause.]* Although a motion for a new trial of a cause in the Common Pleas at Lancaster may be made in any one of the superior courts at Westminster; yet it should be made to that court of which the judge who tried it is a member. *Foster v. Jolliffe*, 1 Scott, 54; and *Smithurst v. Taylor*, 1 Dowl. & L. 375, Ex.

The general rule is, that application for a new trial, &c., in an action in the Court of Common Pleas at Lancaster, should be made in the superior court in which the judge sits who tried the action. But the Court of Queen's Bench refused to discharge a rule which had been made in that court, without mentioning the circumstance, merely on the ground that the action had been first tried before a baron of the Exchequer. *Catterall v. Keynon and Wife*, 11 Law J., Q. B. 260.

*New trial in penal action, after verdict for defendant.]* The court has authority to, and will, grant a new trial in a penal action, though the verdict be for the defendant, where they are satisfied that the verdict is in contravention of law, whether the error has arisen from the misdirection of the judge, or from a misapprehension of the law by the jury, or from a desire on their part to take the exposition of the law into their own hands. *Attorney General v. Rogers*, 11 Mee. & W. 670.

*Certiorari for new trial on a judgment in an inferior court.]* A clause in a court of requests act enacted "that no plaint entered in the said court, nor any order, judgment, or proceeding therein, should be removed into any superior court by any writ or process whatsoever, except by leave of a judge of one of the superior courts at Westminster and then only in cases where the debt claimed should exceed 5*l.*" and that in all such cases a judge should have power to stay proceedings on certain terms:—Held, that these words took away the common law right of certiorari, in cases where the leave of a judge was not obtained, and the debt fell short of 5*l.*, but did not authorize the removal of a judgment into the court above, for the purpose of obtaining a new trial. *Fox v. Veall*, 8 Mee. & W. 126; 10 Law J., Ex. 273.

## NISI PRIUS.

*Postponement of trial—absence of witness—costs.]* A defendant cannot be presumed to know what evidence will be required until after issue joined ; and therefore, where it appeared that, between that time and the first day of the assizes, due diligence had been used to procure the attendance of a material and necessary witness, but without effect, the judge ordered the trial to be put off, on the defendant bringing the money into court, and paying costs. *Dale v. Heald*, 1 Car. & K. 314.—Rolle, B.

*Trial, postponement of, on payment of costs.]* Where a trial is postponed by a judge's order, on payment of the costs of the day, unless the order is accompanied by an appointment to tax the costs, the opposite party may treat it as a nullity, and proceed to try the cause. *Waller v. Joy*, 16 Law J., Ex. 17.

*Trial of cause after the return day of the distingas.]* A venire facias directed the sheriff to summon a jury for the first sittings in Hilary term. The second sittings commenced on the 19th of January, the distingas was returnable on the 20th, and the cause was tried by adjournment of the sittings on the 22nd :—Held, no mis-trial. *Cheetham v. Sturtevant*, 1 Dowl. & L. 631.

*Trial of the validity of a patent not stayed pending a scire facias.]* Where an action is brought to try the validity of a patent, the court will not, except under peculiar circumstances, order the trial to be postponed until a scire facias, brought to repeal the same patent, has been disposed of. *Muntz v. Foster*, 6 Man. & G. 1017; 7 Scott N. R. 898; 1 Dowl. & L. 942.

*Death of defendant before the trial.]* Where three causes stood over by adjournment from one sitting day in term to another, and before they were tried the defendant died, the court refused to name a special adjournment day in term for the trials of the causes to prevent the suits abating. *Nathan v. Budge*, 3 Dowl. 207.

A cause was in the paper, for the sittings in term, and the judge not having reached it in the list, the sittings were adjourned to another day in term, previous to which the defendant died. The judge adjourned the sittings on this day to the last day of term. But the court decided that the trial could not take place on that day, as the public business could not be so much interfered with, and they could give no relief to the plaintiff. *Johnson v. Budge*, 1 C. M. & R. 647; 4 Law J., Ex. 31.

*Discretion of judge at Nisi Prius to direct the acquittal of a defendant in trespass.]* Where, in action of trespass, at the close of the plaintiff's case, there is no evidence against one of several defendants, it is in the judge's discretion whether he will direct a verdict of acquittal to be entered as against him ; and where he had refused to do so, and the jury had subsequently found a verdict for the plaintiff against all the defendants, the court declined to grant a rule for a new trial. *White v. Hill and others*, 2 Dowl. & L. 537, Q. B.

*Juror withdrawn by consent—second action for same cause stayed.]* On a trial in the Exchequer, a juror was withdrawn by consent. Afterwards, plaintiff sued the defendant in the Court of King's Bench for the same cause of action. The court stayed the proceedings as being contrary to good faith; although the plaintiff, who had conducted the first cause himself, and was not a lawyer, deposed that he did not know that the arrangement would debar him from bringing a second action. *Moscati v. Lawson*, 4 Ad. & E. 331.

*Refusal of a judge at Nisi Prius to try an action on a fight.]* The Lord Chief Justice would not try an action for money had and received, to recover back a deposit paid to abide the event of a wrestling match, which did not take place. *Kennedy v. Gad*, 1 M. & M. 225; 3 C. & P. 376.

And where an action for money had and received was brought against the stakeholder, on a dog-fight, to recover the stakes, on the ground that the plaintiff's dog won, the judge ordered it to be struck out of the cause paper, as he would not try which dog won the battle. *Egerton v. Furzeman*, 1 Ry. & M. 213; 1 C. & P. 613.

*Right to begin, by the plaintiff.]* The fifteen judges have made a resolution that the plaintiff shall begin on the trial in all actions for personal injuries, libels, and slander, although the general issue may not be pleaded, and the affirmative be on the defendant. *Carter v. Jones*, 6 C. & P. 64.—Tindal, L. C. J.

The new rule of practice made by the judges, as to the right to begin, does not extend to actions of contract. *Lewis v. Wells*, 7 C. & P. 221.—Coleridge, J.

In covenant, the party on whom the affirmative of the issue lies is entitled to begin, though the damages are unascertained. *Reeve v. Underhill*, 1 M. & R. 440.—Tindal, L. C. J.

Upon a plea in abatement of the non-joinder of other parties, the plaintiff is entitled to begin, unless the damages are admitted. *Morris v. Lotan*, 1 M. & R. 233.—Denman, Lord.

In an action for libel, where there is no general issue, but a justification as to part, and judgment is suffered by default as to the residue, the plaintiff is entitled to begin. *Wood v. Pringle*, 1 M. & R. 277.—Denman, Lord.

The plaintiff is entitled to begin where damages of an unascertained amount are the object of the action, though the affirmative of the issues on the record be with the defendant. *Carter v. Jones*, 1 M. & R. 281.—Tindal, L. C. J.

In assumpsit for work and labour, the defendant pleaded that the "promise was made to the plaintiff and J. S., and not with the plaintiff alone." Replication, that the "promise was made to the plaintiff alone, and not to the plaintiff and J. S.":—Held, that on this issue the plaintiff ought to begin. *Davies v. Evans*, 6 C. & P. 619.—Parke, B.

If in an action for false imprisonment the defendant plead, as a justification, that the plaintiff stole feathers, and that he was therefore imprisoned, and the plaintiff reply *de injuriâ*, the plaintiff is entitled to begin, although the affirmative is on the defendant, and there be no general issue. *Atkinson v. Warne*, 6 C. & P. 687.—Gurney, B.

In assumpsit, the declaration stated, that the defendant agreed to build houses according to a specification :—Held, that on this issue the plaintiff must begin, and prove that the defendant had not built according to the specification. *Smith v. Davies*, 7 C. & P. 307.—Alderson, B.

Trover by the assignees of a bankrupt against the sheriff for goods. Plea, that R. J. sued out a writ of fi. fa. against the bankrupt, and that it was delivered to the sheriff before the bankruptcy, and that the sheriff seized and sold the goods, and that no docket had been struck against the bankrupt, neither had the sheriff any notice of any act of bankruptcy. Replication, that the judgment was obtained against the bankrupt by cognovit, in an action commenced by collusion, and that the fiat issued within two months after the seizure. Rejoinder, that the action was commenced adversely :—Held, that on these pleadings the plaintiff must begin. *Scott v. Lewis*, 7 C. & P. 347.—Coleridge, J.

In considering which party ought to begin, it is not so much the form of the issue which is to be considered as the substance and effect of it ; and the judge will consider what is the substantial fact to be made out, and on whom it lies to make it out.

In an action of covenant to repair, the breach was, that the defendant did not repair, but suffered the premises to be ruinous, &c. Plea, that the defendant did repair, and did not suffer the premises to become ruinous, &c.:—Held, that on this issue the plaintiff must begin. *Soward v. Leggatt*, 7 C. & P. 613.—Abinger, Lord.

The declaration stated, that the defendant agreed to deliver “hay of good quality, and such as no reasonable man would object to.” Breach, that although the plaintiffs were willing to accept the hay, the defendant refused to deliver any other hay than of bad quality. Plea, that the defendant tendered hay “of good quality, and such as no reasonable man would object to, and the plaintiffs refused to receive it ; without this, that the plaintiffs were ready and willing to accept the residue of the hay as in the declaration mentioned,” concluding to the country :—Held, that on these pleadings the plaintiff's must begin, as the plea was a traverse of an allegation in the declaration. *Crowley v. Page*, 7 C. & P. 789.—Parke, B.

In assumpsit, for unworkmanlike execution of a contract. Plea, the work was properly done ; the plaintiff is entitled to begin. *Amos v. Hughes*, 1 M. & R. 464.—Alderson, B.

In replevin, any issue in which the affirmative is on the plaintiff gives him the right to begin. *James v. Salter*, 1 M. & R. 501.—Gurney, B.

In an action on a policy of insurance on a life, the defendant pleaded that the declaration contained in the policy was untrue in this, that the person was not in good health. Replication, that the declaration in the policy was true, and that the party was in good health :—Held, that on these pleadings the plaintiff was entitled to begin. *Rawlins v. Desborough*, 8 C. & P. 321 ; 2 M. & R. 70.—Denman, Lord.

To a declaration on an agreement for not repairing premises in a reasonable time, the defendant pleaded that he did repair within a reasonable time :—Held, that on these pleadings the plaintiff should begin, for if no evidence was offered on either side, the defendant

would succeed. *Belcher v. M'Intosh*, 8 C. & P. 720; 2 M. & R. 186.—Alderson, B.

If in replevin the defendant avow for rent in arrear, and the plaintiff reply riens in arrear, the plaintiff must begin. *Cooper v. Egginton*, 8 C. & P. 748.—Patteson, J.

On issues joined in an action on a charter-party, “that the defendant did furnish sufficient cargo,” and “that the plaintiff refused, after notice, to receive the cargo offered,” the plaintiff is entitled to begin. *Ridgway v. Ewbank*, 2 M. & R. 217.—Alderson, B.

As to the right to begin in those cases which are not within the rule of the judges as to personal injuries, libel, and slander, but where the affirmative of the issue is on the defendant:—Held, that it must be left to the judge to decide in each particular case, whether the substantial question is the assessment of damages; and if it is, the plaintiff will be entitled to begin. *Hoggett v. Oxley*, 9 C. & P. 324; 2 M. & R. 251.—Maule, J.

In assumpsit, on the warranty of a horse, where the plaintiff in his declaration averred that the horse was not sound, and the defendant only pleaded that it was; upon which issue was joined:—It was held, that the plaintiff had the right to begin. *Osborn v. Thompson*, 9 C. & P. 337; 2 M. & R. 254.—Erskine, J.

In an action on a bill of exchange by indorsee against acceptor, the defendant pleaded pleas, denying the acceptance and the indorsement, and also two pleas of payment, upon all of which issue was joined. The defendant's counsel at the trial offered to admit the acceptance and indorsement, and wished to begin:—Held, that this admission of all the facts, the proof of which was on the plaintiff, did not entitle the defendant to begin. *Pontifex v. Jolly*, 9 C. & P. 202.—Alderson, B.

In assumpsit for wrongfully dismissing a “pupil and assistant” to a surgeon, the defendant pleaded that the pupil and assistant so misconducted himself as to make it necessary to dismiss him to prevent his ruining the defendant's practice, and the plaintiff replied *de injuriâ*:—Held, that on these pleadings the plaintiff was entitled to begin. *Wise v. Wilson*, 1 Car. & K. 662.

In all cases at Nisi Prius, in which the plaintiff claims damages, the amount of which is unascertained, he has a right to begin, although the affirmative of the issue on the record rests with the defendant. In an action of covenant by an attorney's clerk for improperly dismissing him, plea, that he conspired with A. B., and in pursuance of that conspiracy was guilty of divers acts of misconduct (which the plea set out,) which came to the defendant's knowledge, who thereupon dismissed him: replication *de injuriâ*:—Held, first, that the plaintiff was entitled to begin; secondly, that to support the plea it was necessary for the defendant to show that he knew and acted upon the knowledge of the alleged misconduct, when he dismissed the plaintiff. *Mercer v. Whall*—Lord Denman, Derby Summer Assizes, 1844.

A motion being made on the above ruling, Lord Denman observed, “I had to decide this point against the authority of a case entitled to great consideration,—*Stanton v. Paton*, 1 Car. & K. 148, which was an action for breach of promise of marriage, and the only plea, a plea of release; Lord Abinger, who tried that cause, held, after ar-

gument, and after consulting my brother Patteson, that the defendant was entitled to begin." 14 Law J., Q. B. 267.

In replevin, defendant made cognizance as bailiff of H. for rent in arrear. Plaintiff pleaded in bar, that the distress was not made within twenty years next after the right to distrain accrued. The defendant replied, that the distress was made within twenty years after the right to distrain accrued:—Held, that the plaintiff should begin, inasmuch as the affirmative was involved in his plea. *Collier v. Clerk*, 5 Q. B. 467; 9 Jur. 158.

Assumpsit on a life policy, one of the terms of which was, that it should be void if anything stated by the assured, in a declaration or statement given by him to the directors of the insurance company, before the execution of the policy, should be untrue. The declaration in the cause averred the truth of this declaration and statement of the assured. The defendant pleaded pleas, respectively alleging, (1 and 2) that the said declaration and statement of the assured was untrue in this, that at the time of making it he had had spitting of blood, consumptive symptoms, and affection of the lungs, an affection of the liver, and a cough of an inflammatory and dangerous nature; sixthly, that at the time he was affected with a disorder tending to shorten life; seventhly, that he was not at that time in good health, and eighthly, that he had falsely averred therein that T. W. was his usual medical attendant. Issues were joined on these pleas:—Held, that the plaintiff was entitled to begin at the trial, the issue on the seventh plea; and, semble, on the other pleas also, being upon him. *Geach v. Ingall*, 14 Mee. & W. 95; 9 Jnr. 691.

Assumpsit on a policy of assurance on life, one of the terms of which was, that it should be void if anything stated by the assured, in a declaration or statement given by him to the directors of the assurance company before the execution of the policy, should be untrue. In this declaration the assured stated, that he had not been afflicted with rupture, or any other disorder which tends to the shortening of life. The declaration in the cause averred the truth of the statement of the assured. Plea, that the declaration or statement was untrue, to wit, in this, that the assured, at the time of the making thereof, was afflicted with rupture, concluding with a verification. Replication de injuria:—Held, that the plaintiff was entitled to begin. *Ashby and others v. Bates*, 15 Law J., Ex. 349.

Where, to an action against the maker of a promissory note, proof of the first four issues lay on the defendant, and to a plea of payment into court the plaintiff replied that the defendant was indebted to him in a larger amount than the sum paid in:—Held, that the plaintiff was entitled to begin. *Booth v. Millns*, 15 Law J., Ex. 354.

*Right to begin—by the defendant.]* In trespass, with plea of liberum tenementum, and no general issue, the defendant is entitled to begin. *Pearson v. Coles*, 1 M. & R. 206.—Patteson, J.

Where a defendant in replevin pleads property in a third person, and issue is taken thereon, he is entitled to begin. *Colstone v. Hiscolbs*, 1 M. & R. 301.—Alderson, B.

In an action for trespass for taking goods, the defendant, without pleading the general issue, pleaded that the house of the plaintiff was

"within and parcel of the parish of M," and that he, being a constable, took the goods under a warrant of distress for parochial rates. The replication stated that the house was not "within or parcel of the parish of M." The plaintiff's counsel claimed the right to begin, as he had to prove the demand of perusal and copy of the warrant. This the defendant's counsel offered to admit:—Held, that the defendant had a right to begin. *Burrell v. Nicholson*, 6 C. & P. 202; 1 M. & R. 304.—Denman, Lord.

In ejectment by lessors claiming under several descents from a particular ancestor, when the defendant admits all the descents except the first, and claims under a will of this ancestor, the defendant is entitled to begin. *Doe d. Wollaston v. Barnes*, 1 M. & R. 386.—Denman, Lord.

In an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded, first, that the bill was accepted for a debt from which he was discharged under the Insolvent Debtors Act, of which the plaintiff, at the time of the indorsement, had notice; and secondly, that the bill was accepted to induce the drawer not to oppose the discharge of the defendant under that act, of which, at the time of the indorsement, the plaintiff had also notice. The plaintiff, in his replication, denied the notice in each of the pleas:—Held, that on these issues, the defendant must begin, and that the onus of proving that the plaintiff had notice was on the defendant. *Warner v. Haines*, 6 C. & P. 696.—Denman, Lord.

If, in assumpsit on bills of exchange, with a count upon an account stated, the defendant pleaded payment to the counts on the bills, and non assumpsit to the account stated:—Held, that the defendant is entitled to begin, unless the plaintiff's counsel have some evidence to give upon the account stated. *Smurt v. Rayner*, 6 C. & P. 721.—Parke, B.

On a plea of payment, if that be the only one, the defendant is bound to begin. *Richardson v. Fell*, 4 Dowl. 10.

A party gave a cheque for the amount of a deposit on a sale by auction, and the sale was void. In an action on the cheque, he pleaded there was no consideration for the cheque, and the plaintiff replied that there was consideration:—Held, that on this issue the defendant must begin. *Mills v. Oddy*, 6 C. & P. 728.—Parke, B.

In a covenant to recover damages for non-performance of an agreement under seal, if the defendant plead only, that the deed was obtained by fraud and covin, the affirmative of the issue being upon him, his counsel has a right to begin, although the damages are uncertain, and evidence is necessary to guide the jury in forming their estimate of them. *Reeve v. Underhill*, 6 C. & P. 773.

In an action for debt, for a penalty of 50*l.*, for taking the plaintiff to prison under mesne process, within twenty-four hours, the defendant pleaded that it was by the plaintiff's own consent. Replication, that he did not consent. The defendant is entitled to begin, as the plaintiff does not go for unliquidated damages. *Silk v. Humphrey*, 7 C. & P. 14.—Coleridge, J.

In action on a bill of exchange, by the indorsee against the acceptor, the defendant pleaded that it was an accommodation bill, and that a blank acceptance had been filled up, and applied in discharge of this and other bills; the plaintiff replied that the defendant "broke his promise without such case as in his plea is alleged":—Held,

that the defendant was entitled to begin. *Faith v. M'Intyre*, 7 C. & P. 44.—Parke, B.

In assumpsit, the plea was, as to 20*l.* payment, and as to the residue, a set-off. The defendant must begin. *Coxhead v. Huish*, 7 C. & P. 63.—Parke, B.

Assumpsit on a bill of exchange, by indorsee against acceptor. The only plea was, that the bill had been altered after acceptance:—Held, that the defendant's counsel had the right to begin, and that upon his calling for the bill, the plaintiff's counsel ought to produce it without notice. *Barker v. Malcolm*, 7 C. & P. 101.—Tindal, L. C. J.

If, in an action for non-repair, &c., the defendant plead affirmative pleas, which are denied by the replication, the defendant is entitled to begin. *Lewis v. Wells*, 7 C. & P. 221.—Coleridge, J.

To a mandamus to a rector to restore a parish clerk, the rector returned, that the clerk was guilty of acts of intoxication, and therefore he dismissed him. The clerk brought an action for a false return, and in his declaration cited the return, and negatived the allegations contained in it. The rector, by his plea, repeated the charges contained in the return:—Held, that on these pleadings, the defendant had the right to begin. *Bowles v. Neale*, 7 C. & P. 262.—Denman, Lord.

In covenant, where the affirmative of the issues is on the defendant, he is entitled to begin, though the damages are unascertained. *Wootton v. Barton*, 1 M. & R. 518.—Parke, B.

Where the plaintiff in ejectment claims as heir-at-law, and the defendant as devisee, if the heirship be admitted, the defendant is entitled to begin, though the plaintiff professes to set up an outstanding term as to part of the property. *Doe d. Smith v. Smart*, 1 M. & R. 476.—Gurney, B.

Where the substantial question to be tried is the existence of a custom affirmed by the defendant, he is entitled to begin, although the plaintiff's counsel alleges that he seeks to recover real damages. *Bastard v. Smith*, 2 M. & R. 129.—Tindal, L. C. J.

In an action against the maker of a promissory note for 100*l.*, the defendant pleaded that it was agreed between him and the payee, at the time of making the note, that the note was to be paid by his carrying goods for the payee, and that it was indorsed to the plaintiff without consideration. Replication, that the plaintiff gave a consideration of 49*l.* for it:—Held, that on this issue the defendant must begin; and that if he offered no evidence, the plaintiff was entitled to a verdict for 49*l.* *Edwards v. Jones*, 7 C. & P. 633.—Alderson, B.

In an issue under the Interpleader Act, the plaintiff averred in the declaration, that certain goods were not the property of the plaintiffs, or either of them. Plea, that the goods were the property of the plaintiffs, or one of them:—Held, that on this issue the defendant had the right to begin. *Hudson v. Brown*, 8 C. & P. 774.—Abinger, Lord.

In assumpsit for wrongfully dismissing a teacher in a school before the expiration of a year, for which he was engaged, and the defendant pleaded only a special plea, justifying the dismissal, upon which issue was taken:—Held, that on this issue the defendant was entitled to begin. *Harnett v. Johnson*, 9 C. & P. 206.—Rolfe, B.

In an action of trespass for taking the plaintiff's goods, the defen-

dant pleaded,—first, as to part of the goods, that he took them as a distress for an annuity payable to M. A.; and secondly, as to the residue, he justified the taking as a distress for rent due to J. A. Replication, to the first plea, that the annuity was not in arrear; and to the second, non tenuit:—Held, that on these pleadings the defendant was entitled to begin. *Aston v. Perkes*, 9 C. & P. 231.—Patteson, J.

To an action to recover damages for the non-performance of several contracts, by which the defendant undertook to deliver divers quantities of spelter within certain specified times, the defendant pleaded, first, that the plaintiff induced him to enter into the contracts by fraud, covin, and misrepresentation; and second, that he would have delivered the spelter within the time specified, but was hindered from so doing by the fraud, &c. of the plaintiff:—Held, that the defendant had the right to begin. *Steinkeller v. Newton*, 9 C. & P. 313.—Tindal, L. C. J.

If in assumpsit the defendant plead his discharge under the Insolvent Debtors Act, and no other plea, and the plaintiff by his replication deny the plea, the defendant must begin. *Lambert v. Hale*, 9 C. & P. 506.—Parke, B.

In assumpsit by the holder against the acceptor of a bill of exchange, the declaration stated that the drawer indorsed to the plaintiff. The defendant pleaded, that the bill was drawn and accepted for his accommodation, and handed to the drawer that he might get it discounted; that the drawer indorsed it in blank, and delivered it to one A. to get it discounted, who, against good faith, delivered it to the plaintiff, for a purpose unknown to the defendant, of all which facts the plaintiff had notice:—Held, that on this state of the pleadings the defendant must begin. *Lees v. Hoffstadt*, 9 C. & P. 599.—Gurney, B.

To an action by the indorsee of a promissory note against the maker, the defendant pleaded, that after the blank indorsement, and before the delivery of the note to the plaintiff, it was in the hands of G. V., as the lawful owner, at the time of making an order of nisi prius, whereby the note and the claim of G. V. thereon were referred to arbitration; that the note was fraudulently delivered to the plaintiff by G. V. after the making of the order, and before any award was made; and that the plaintiff took the note with the full knowledge of the premises. The replication traversed the knowledge of the plaintiff. Notice was given to the plaintiff, to prove the consideration given by him:—Held, that under these pleadings, the burden of proof lay upon the defendant, and that he was bound to begin. *Smith v. Martin*, 11 Law J., Ex. 129.—Abinger, Lord.

In debt, the declaration was for 40*l.*, for goods sold, and for 40*l.* on an account stated; the particulars of demand were for a balance of 29*l.* 10*s.*; but in the particulars no credits were given, or dates specified. The defendant pleaded a general plea of payment to the whole declaration:—Held, that under these circumstances the defendant must begin. *Birt v. Leigh*, 1 Car. & K. 611.—Pollock, L. C. B.

In an action for selling oil for the hair in bottles, and with envelopes resembling those of the plaintiff's, the defendant pleaded, that the oil sold by the plaintiffs was prepared from oil of an inferior quality, and was useless and valueless, and that the plaintiff's knew it; and that the oil sold by the plaintiffs was by reason thereof a fraud on all

persons buying the same. The plaintiffs replied *de injuriâ* :—Held, that on these pleadings, the defendant was entitled to begin. *Rowland v. Berhens*, 1 Car. & K. 46.—Abinger, Lord.

To an action of trespass qu. cl. fr., the defendant justified the entry, &c., for the purpose of removing an obstruction to his enjoyment of a right. The replication traversed the right :—Held, that on the counsel for the plaintiff, at the trial, declining to say that they intended to proceed for substantial damages, the judge rightly decided that the defendant should begin. *Chapman v. Rawson and others*, 15 Law J., Q. B. 225.—Tindal, L. C. J.

In ejectment where the lessor of the plaintiff claims title to the premises as devisee under the testator's will, the execution of which is admitted by the defendant, who claims title to the same premises under a will subsequently executed by the testator :—Held, that the defendant should begin. *Doe d. Bather v. Brayne and another*, MS. Salop Spring Assizes, 1847.—Gaselee, Serjeant.

### NOLLE PROSEQUI.

*A nolle prosequi is a bar to a future action.]* The plaintiff on a declaration containing several counts, after the defendant had suffered judgment by default, entered upon the record a nolle prosequi to some of the counts, and afterwards commenced an action on the subject to which such counts were applicable. The court held, that such nol. pros. after judgment was equivalent to a retraxit, and a bar to any future action. *Bowden v. Horne*, 7 Bing. 714.

Where a nolle prosequi is entered on a plea, going to the whole cause of action, the defendant is entitled to judgment upon the whole record. *Peters v. Croft*, 6 Scott, 897.

*Nolle prosequi, effect of, in pleading.]* To a declaration in assumpsit for goods sold and money had and received, damages 100*l.*, the defendant pleaded, first, non assumpsit; secondly, the statute of limitations; thirdly, payment; fourthly, a set-off of 58*l. 15s.* on a judgment, and of 200*l.* for money paid, &c. The plaintiff, by his replication, joined issue on the first plea, and traversed the others, except as to so much of the plea of set-off as related to the judgment, and as to that replied, that he would not further prosecute his suit, in respect of so many of the promises in the declaration as were satisfied by the said judgment being so set off.

On the trial, the plaintiff proved the defendant was indebted to him in 28*l. 16s. 11d.* only, and that no part of that sum was barred by the statute of limitations. Some of the items in the plaintiff's particulars of demand were barred by the statute. No evidence was given of any payment by the defendant, or of any set-off, except as admitted on the record :—Held, that the nolle prosequi was entered to the whole cause of action; that the verdict should be entered for the defendant upon the first and second issues; and for the plaintiff on the third and fourth; and that the defendant was entitled to judgment on the whole record. *Amor v. Cuthbert*, 10 Law J., C. P. 274.

*Nolle prosequi, co-defendant, entering of.]* A nolle prosequi against

one of two defendants may be entered at the trial of the cause upon the nisi prius record; but nolle prosequi is not proved by the production of the issue roll, which is not a record of the court until brought in and entered upon the roll. *Fagan v. Dawson and another*, 11 Law J., C. P. 319.

## NON PROS.

*Non pros.—one of several defendants not entitled to judgment.*] In trespass against several defendants, one defendant who has alone demanded a declaration, which has not been delivered, is not entitled to sign judgment of non pros. for all the defendants. *Hamlet v. Breedon*, 4 Man. & G. 909; *S. C. nom. Hamlet v. Bingham*, 5 Scott N. S. 889.

*Non pros. for not declaring.*] If a demand of declaration has been served, and time to declare is obtained, the defendant may sign judgment of non pros. without a fresh demand of declaration. *Wells v. Hare*, 1 Dowl. 366.

The defendant being entitled to sign judgment of non pros. for want of a declaration, the plaintiff's attorney, to prevent the non pros., obtained a rule to discontinue on payment of costs; instead of complying with such rule, as soon as it had expired, he served the defendant with a declaration:—Held, a fraud on the proceedings of the court; and, the defendant having entered up judgment of non pros., the court refused to set it aside. *Ariel v. Barrow*, 8 Bing. 375; 1 Law J., C. P. 117; 1 M. & Sc. 581.

*Non pros., appearance must be complete and regular.*] In an action against several defendants, a judgment of non pros. cannot be signed until all have appeared. *Palmer v. Feistel*, 2 Dowl. 507.

The defendant entered an irregular appearance within the eight days; the plaintiff gave him notice of the irregularity, and he promised to examine and correct it, but, instead of doing so, entered a new appearance in the next term in a fresh book, and demanded a declaration; and the plaintiff not declaring in due time, the defendant signed judgment of non pros. The court held, that the irregular appearance might have been corrected in the book, and set aside the judgment of non pros.; the costs to be costs in the cause. *Bate v. Bolton*, 2 C. M. & R. 365; 4 Dowl. 160; 1 T. & G. 148.

*Non pros. on an imperfect application.*] Where the plaintiff replies that he is satisfied on payment of money into court, the defendant is entitled to judgment of non pros. on the other pleas. *Emmett v. Stauden*, 3 Mee. & W. 497; 7 Law J., Ex. 198; 6 Dowl. 591; and *Topham v. Kidmore*, 5 Dowl. 676.

*Non pros. for not entering issue.*] After a judge's order for time to enter the issue, the defendant may sign judgment of non pros. immediately on the expiration of the time, without giving the plaintiff twenty-four hours more. *Davies v. Cooper*, 4 Doug. 5.

But a non pros. for not entering the issue pursuant to rule is irregular after notice of trial. *Howell v. Jacobs*, 5 Dowl. 394.

*Non pros., motion to set aside—affidavit.* The affidavit in support of a motion to set aside a judgment of non pros., should state either that there is a good cause of action on the merits, or that there is a present cause of action. *Cortessos v. Hume*, 2 Dowl. 134.

*Judgment of non pros. signed too soon.]* Whether an appearance be entered in term or vacation, the plaintiff has the whole of the term next following to declare in; and therefore where an appearance was entered in Easter term, and judgment of non pros. signed in Trinity term, it was held that the judgment was irregular. *Foster v. Pryme*, 8 Mee. & W. 664.

## NONSUIT.

*Nonsuit, motion to enter.]* If the counsel for a defendant has addressed the jury and examined witnesses, he has no right then to address the judge for a nonsuit. *Roberts v. Croft*, 7 C. & P. 376.

The court will not entertain an application for a nonsuit upon an objection taken at the trial, but not reserved by the judge. *Matthews v. Smith*, 2 Y. & J. 426.

A party can only move to enter a nonsuit where leave has been given by the judge at the trial. *Ricketts v. Burman*, 4 Dowl. 578, B. C.

The court have no authority to direct a nonsuit to be entered, unless leave has been reserved to the defendant to make a motion for that purpose at the time of the trial. *Morgan v. Harris*, 2 C. & J. 461; 1 Law J., Ex. 143; 1 Dowl. 570.

Where it does not appear by the notes of the under-sheriff that leave has been reserved to move to enter a nonsuit, the court will not entertain a motion for that purpose. *Beverley v. Walter*, 8 Dowl. 418.

Where the judge at Nisi Prius improperly gives leave to the defendant to move to enter a nonsuit, the court, to prevent the party being deprived of the benefit intended for him, will allow him to move to arrest the judgment, if such appears to them the course which should be pursued. *D'Oyley v. Roberts*, 3 Bing. N. C. 835; 6 Law J., C. P. 279; 5 Scott, 40.

*Nonsuit, plaintiff's consent necessary.]* At the close of the plaintiff's case, the judge being pressed to nonsuit, although he had a strong impression that there was no evidence for the jury, refused; but reserved leave to the defendant to move to enter a nonsuit. The case afterwards went to the jury, and after consulting several hours, they came into court and said they could not agree; upon which his lordship, acting upon his first impression, that there was no evidence to go to the jury, directed the plaintiff to be called, and nonsuited him:—Held, that the judge had no power to nonsuit the plaintiff.

Held, secondly, on the motion for a new trial, that as the plaintiff gave his consent to be nonsuited, if the court should be of opinion that there was no evidence to go to the jury, *conditionally*, that he had the chance of a verdict of the jury in his favour; and as, by what took place, he was deprived of that chance, the plaintiff was not in the same situation as if the verdict had passed for him, with leave to the defendant to move to enter a nonsuit; and it was not

open to the defendant to contend, that there was no evidence to go to the jury. *Dewar v. Purday*, 3 Ad. & E. 166; 4 Law J., K. B. 164; 4 N. & M. 633.

*Nonsuit where there are several defendants.]* The court held, in an action against several joint defendants, if one of them have a verdict, the plaintiff cannot be nonsuited as to the others. *Revell v. Browne*, 2 M. & P. 18.

But one of several defendants suffering judgment by default does not preclude a nonsuit. *Murphy v. Donlan*, 5 B. & C. 178.

*Nonsuit, where some issues found for defendant and some for plaintiff.]* A verdict had been entered for the defendant on two issues, and for the plaintiff on two others, but which, it was admitted, could not be supported, if the court should be of opinion that a variance was fatal; and the judge reserved liberty to enter a nonsuit accordingly. The court held, that the court might direct a nonsuit to be entered, notwithstanding the issues found for the defendant. *Shepherd v. Bishop of Chester*, 4 M. & P. 130; 6 Bing. 437.

*Nonsuit, motion to set aside.]* Submitting to a nonsuit in deference to the opinion of the judge at the trial, which opinion is incorrect, does not estop the plaintiff from moving to set aside such nonsuit. *Alexander v. Barker*, 2 C. & J. 133; 2 Tyrw. 140; and *Sweet v. Lee*, 4 Scott N. R. 77, 86.

It is no ground for setting aside a nonsuit that the plaintiff applied for it after the judge began summing up. *Simpson v. Clayton*, 2 Bing. N. S. 467; 2 Scott, 291.

If the plaintiff be nonsuited without his consent a new trial will be granted. *Dewar v. Purdy*, 4 N. & M. 633; 3 Ad. & E. 166.

Where a plaintiff, of his own accord, elects to be nonsuited, he cannot afterwards move to set aside that nonsuit. *Barnes v. Whiteman*, 9 Dowl. 181, B. C.

Where the plaintiff was nonsuited through the neglect of the attorney's clerk to attend in court, the court refused to set aside the nonsuit, except upon the terms of the plaintiff's attorney paying the costs occasioned by the defendant's attending to try. *White v. Sandell*, 3 Dowl. 798, Ex.

*Nonsuit through the neglect of the attorney.]* On setting aside a nonsuit, occasioned by the neglect of an attorney to deliver briefs to counsel, and to procure the attendance of witnesses, the court will not require the attorney to pay costs as between attorney and client, if satisfied that he had reasonable ground to suppose that the cause would not be called on so early. *Proudstone v. Tremlow*, 1 Law J., Ex. 175.

## NOTICE OF ACTION.

*Form of notice of action.]* The form of the notice of action is immaterial, provided it be intelligible. *Gimbert v. Coyney*, 1 M'Clel. & Y. 469.

A notice for local trespasses, if it be correct in fact, though not

accurate as a technical description of the premises, suffices. *Gibbs v. Stead*, 8 B. & C. 528.

A misdescription of the warrant alleged to have been illegally granted will vitiate the notice. *Aked v. Stocks*, 4 Bing. 509; 1 M. & P. 346.

A notice given under a particular statute must show that the party was "acting in execution of the act." *Towsey v. White*, 7 D. & R. 810; 5 B. & C. 125.

A notice may be given by attorney in partnership, and need not contain the Christian names of the members of the firm. *James v. Swift*, 4 B. & C. 681; 2 C. & P. 237.

In a notice of action the month is computed exclusive of the day of serving the notice and the day of suing out the writ. *Young v. Higgon*, 6 Mee. & W. 49; 8 Dowl. 213.

When notice of action should be given, its omission is a bar to the plaintiff's right of action altogether. *Towsey v. White*, 5 B. & C. 125.

*Notice of action, where required.*] Notice of action is only required where the party sued had reasonable ground for supposing that he was acting legally, not where wrong done wholly without authority. *Cook v. Leonard*, 6 B. & C. 351; *Norris v. Smith*, 2 P. & D. 353; *Wright v. Wales*, 5 Bing. 336; *Butler v. Ford*, 1 C. & M. 662.

Notice is not necessary where a party had held a particular office, but the appointment to which in fact had not been renewed. *Lidster v. Borrow*, 9 Ad. & E. 654.

Notice must be given where the act is done by subordinate officers; and evidence of their acting officially is sufficient, without strict proof of appointment. *Butler v. Ford*, 3 Tyrw. 677; 1 C. & M. 662.

Under a statute that notice should be given to parochial officers for anything done in pursuance of the act, applies only to torts, not to actions on contracts. *Fletcher v. Greenwell*, 4 Dowl. 166.

Notice need only be given where a thing is done by virtue of a statute, and not where done in contravention of it. *Charlesworth v. Rudgard*, 1 C. M. & R. 498; 4 Tyrw. 124.

A justice of the peace is not entitled to notice where the jury think he is not acting under a bona fide impression that what he did was within the scope of his duty. *James v. Saunders*, 10 Bing. 429; 4 M. & Sc. 316.

Notice must be given though the act be wrongful. *Wedge v. Berkley*, 1 N. & P. 665.

The 2 Geo. 3, c. 28, giving further protection to parties, does not deprive them of right to notice under 24 Geo. 2, c. 44. *Rogers v. Broderip*, 9 D. & R. 194.

A party entering bona fide under a warrant of the commissioners of the Southwark Court of Requests, is entitled to fourteen days' notice of action. *Cook v. Clark*, 10 Bing. 19; 3 M. & Sc. 371; 2 Dowl. P. C. 732.

A toll collector who exacts too large a toll is entitled to notice of action under the words "any person for anything done in pursuance of the act." *Waterhouse v. Keen*, 4 B. & C. 200.

Where an act provided that a plaintiff should not recover in any action for anything done in pursuance of the act, unless twenty-one days' notice of action should be given:—Held, that defendant must

plead the want of such notice, or he could not avail himself of it. *Davey v. Warne*, 14 Mee. & W. 199; 15 Law J., Ex. 253.

The 71st sec. of 7 & 8 Geo. 4, c. 29, protects all persons who act under the bona fide and reasonable belief that they are acting under the provisions of that statute. *Hughes v. Buckland*, 15 Mee. & W. 346; 3 Dowl. & L. 702; 15 Law J., Ex. 233.

Therefore, where A., who was fishing very near a private fishery, had his nets seized, and was taken into custody by the owner of the fishery, under the provisions of the stat. 7 & 8 Geo. 4, c. 29, ss. 35 & 63, who in so doing acted under a bona fide and reasonable belief that the spot where the arrest and seizure took place was within the limits of his fishery:—Held, that he was entitled to notice of action, and the other protection granted by that section. *Ib.*

The members of a board for repair of the highways in the parish of B., having resolved that the surveyor should be directed to open the locus in quo to the public, on the suggestion that there was an ancient right of footway over it, the surveyor did, in pursuance of such resolution, remove a gate obstructing such supposed right of footway. An action of trespass being brought against the members of the board and the surveyor:—Held, that they were entitled to twenty-one days' notice of action, under 5 & 6 Will. 4, c. 50, s. 109, it being admitted that the act was done bona fide. *Smith v. Hopper and others*, 16 Law J., Q. B. 93.

County magistrates who, acting under 3 & 4 Vic. c. 84, s. 6, convict a party of an offence under the 2 & 3 Vic. c. 71, are entitled to the privileges of a metropolitan police magistrate, under the last mentioned statute, and, therefore, to the same limitation of three months upon any action against them, which a police magistrate would have had. The Metropolitan Police Acts are not local and personal acts, or acts of a local and personal nature within the statute 5 & 6 Vic. c. 97. *Barnett v. Cox and another*, 16 Law J., Q. B. 80.

*Notice of action—surveyor of highways.]* An action was brought against a surveyor of highways for allowing and causing a heap of gravel, which had been placed for the purposes of the repair of the highway, to remain upon it, without taking any care or precaution to guard against damage to persons passing along it, contrary to his duty in that behalf:—Held, that the action was brought for a “thing done in pursuance of, or under the authority of,” stat. 5 & 6 Will. 4, c. 50, and therefore, that he was entitled to notice of action by virtue of sec. 109 of that act. *Davis v. Curling*, 15 Law J., Q. B. 56; 10 Jur. 69.

*Notice of action—railway company—negligence.]* By the London and Brighton Railway Company's Act, the company was empowered to make and maintain a railway; all persons were to have liberty to use the same, with carriages properly constructed, upon payment of tolls; and the company was empowered to provide locomotive engines and carriages for the conveyance of passengers and goods. It was also enacted, that no action should be brought against any person for any thing done or omitted to be done in pursuance of the act, without twenty days' notice:—Held, that the company was not entitled to notice where an action was brought against them for negligence in carrying a passenger, as they were sued merely as carriers, and not

for anything done or omitted under the act. *Carpue v. London and Brighton Railway Company*, 5 Q. B. 747; 3 Railw. Cas. 692; Dav. & M. 608.

A railway company is not entitled to notice of action for negligence in carrying goods. *Palmer v. Grand Junction Railway Company*, 4 Mee. & W. 749; 7 Dowl. 732.

*Notice of action to justices—form of.]* A notice of action to justices, under 24 Geo. 2, c. 44, stated the cause of action thus:—"for that you, on the 10th May, 1844, with force and arms, caused an assault to be made upon me, and then caused me to be beaten, &c., and to be forced and compelled to go along divers public streets and roads, &c., to a certain prison, to wit, at Louth, in &c., and to be unlawfully imprisoned and kept in prison there for forty days then next following," &c. At the trial, the proof was confined to the imprisonment in the gaol at Louth, under an invalid warrant of the defendants:—Held, that the notice sufficiently stated the place of the injury, so as to enable the plaintiff to recover in respect of such imprisonment. *Jacklin v. Fytche*, 14 Mee. & W. 381; 15 Law J., Ex. 102.

A notice of action to a magistrate, under 24 Geo. 2, c. 44, need not state the form of action; it is sufficient to state the cause of action. "You having, on the 14th day of October, 1843, caused me to be apprehended and committed to a certain gaol in M., and to be there imprisoned, &c., I shall, &c., cause a writ of summons to be sued out, &c., against you for the said imprisonment:—Held, sufficient. *Prickett v. Gratrex*, 15 Law J., M. C. 145; 10 Jur. 566, Q. B.

*Notice of action to surveyors of highways informally appointed.]* The defendants, who had been appointed surveyors of the highways, but in an informal manner, bona fide believing themselves to be such surveyors, and to have been duly appointed, cut down a tree which overhung the highway, and was a nuisance to it:—Held, that they were entitled to notice of action under the Highway Act, 5 & 6 Will. 4, c. 50, s. 100, as for a thing done in pursuance of the act. *Huggins v. Waydey and another*, 16 Law J., Ex. 136.

*Notice of action under Metropolitan Police Act, form of.]* Under 10 Geo. 4, c. 44, s. 41, which requires "that notice in writing of such action, and of the cause thereof, shall be given to the defendant," &c., a notice omitting to state either the time or place of the committing of the act complained of is insufficient.

The meaning of the provisions of 10 Geo. 4, c. 44, and of 24 Geo. 2, c. 44, in this respect, is substantially the same, and the same effect is to be given to both. *Breese v. Jerdein and others*, 12 Law J., Q. B. 234.

*Notice of action—sufficiency of time and place.]* A notice of action against special constables stated the action to be brought for false imprisonment, committed by the defendants in arresting and imprisoning the plaintiff at St. Asaph, in the county of Flint, on Tuesday the 30th of January last, on a charge of felony, and taking him thence in custody to Denbigh, and detaining him in custody upon such charge for twelve hours; and also for causing him to be taken before divers of her Majesty's justices of the peace at Denbigh, on the 31st of

January in the year aforesaid, on the said charge of felony:—Held that the time and place of committing the grievance were sufficiently specified. *Johnes v. Nicholls and another*, 14 Law J., Ex. 42.

*Notice of action—attorney's address—attorney on record.]* The 24 Geo. 2, c. 44, s. 1, which requires that the notice of action against a justice of the peace shall be indorsed with the name and place of abode of the attorney suing out the same, is satisfied where the attorney indorses his office of business, though he actually resides elsewhere. It is no objection to such notice, that a different person appears to be the attorney on the record. *Roberts v. Williams*, 5 Law J., M. C. 23; 5 Tyrw. 583; 4 Dowl. 486.

## NOTICE OF TRIAL.

*Short notice of trial if necessary.]* Where, by a judge's order, the defendant is under terms of taking short notice of trial, if necessary, he is not bound to take short notice if he puts in a plea sufficiently early to enable the plaintiff to give full notice of trial. *Nicholl v. Forshall*, 15 Law J., Q. B. 203.

Even though a defendant be under terms “to take short notice of trial if necessary,” he is nevertheless, entitled to full notice if there be time for giving it. *Hitching v. Farrow*, 9 Jur. 809, B. C.—Wightman, J.

Where the defendant is under terms to take short notice of trial for the last sittings in term, he is not bound to take short notice for the sittings after term. *Isaacs v. Windsor*, 3 Doug. 430.

A judge's order for time to plead imposed the terms of taking short notice of trial, if necessary, whether tried before the sheriff or not. The court held, that the plaintiff, neglecting to try on the next practical day on which the sheriff sat after issue joined, was bound to give full notice of trial for any subsequent day. *Dignum v. Ibbotson*, 3 Mee. & W. 431.

Where a defendant is under terms to accept short notice of trial for the first sittings in term, and the plaintiff, without any default on the part of the defendant, is unable to reply, so as to give such notice, a short notice of trial for the second sittings is irregular. *White v. Clarke*, 8 Dowl. 730, B. C.

An undertaking to accept short notice of trial does not entitle the plaintiff to give short notice of countermand. *King v. Jones*, 2 Law J., Ex. 1; 1 C. & M. 71; and *Sutton v. Barnett*, 2 Law J., Ex. 2.

*Short notice of trial for one sitting does not apply to a subsequent sitting.]* A judge's order, binding the defendant to take short notice of trial “for the sittings in or after Easter term” does not authorize the plaintiff to give short notice of trial for any subsequent sittings. *Slatter v. Painter*, 8 Mee. & W. 672; 10 Law J., Ex. 476; and *Dignum v. Mootyn*, 7 Law J., Ex. 136; 6 Dowl. 547.

*Notice of trial for sittings after term.]* Where the notice of trial was given generally for the sittings after term, without specifying, according to the rule of Hilary, 23 Geo. 3, (C. P.) at the first or adjourned sittings, but the defendant took steps for trying at the latter,

and could not have been misled:—Held, that the objection had been waived by him. *Younge v. Fisher*, 2 Dowl. N. S. 637; 2 Scott N. S. 893.

*Short notice of trial does not apply to writ of inquiry.]* Where a defendant is under terms to take short notice of trial, he is not bound to take short notice of executing a writ of inquiry. *Stevens v. Pell*, 2 C. & M. 421; 2 Dowl. 355.

*Service of notice of trial.]* Service of notice of trial on a female stating herself to be the house-keeper of the house in which the offices of the attorney were situate, and authorized to receive papers for him:—Held insufficient. *Peddie v. Pratt*, 7 Scott, N. S. 894.

*Notice of trial, continuance of.]* In a London cause, which stood for trial for the first sitting in Michaelmas term, the plaintiff, on the 24th November, gave notice of continuance to the sittings after term:—Held, that although this was virtually a notice for the adjournment day, the 15th December, and the plaintiff had therefore full time to countermand the first notice, and give a fresh notice of trial, that he was not bound to do so, and that the notice of continuance was sufficient. *Toulmin v. Elgie*, 3 Dowl. & L. 558; 15 Law J., Q. B. 128.

An intervening Sunday is not reckoned as a day in a notice of continuance of trial; therefore, where a cause stands for trial on Monday, such notice served on a Saturday is insufficient. *Grosjean v. Manning*, 1 Law J., Ex. 252; 2 C. & J. 635; 2 Tyrw. 725; and *Wardle v. Ackland*, 3 Tyrw. 819.

The same time is to be given in a notice of trial by continuance as in the notice of countermand of trial. *Forbes v. Crow*, 1 Mee. & W. 465; 5 Law J., Ex. 169.

Notice of trial by continuance need not specify the place and hour of trial, since it must be taken to refer to the place and hour specified in the original notice. *Wilson v. Nesbitt*, 11 Law J., C. P. 206.

*Notice of trial before issue joined.]* Where the replication concludes to the country, notice of trial before issue joined is regular. The countermanding a notice is no violation of a stay of proceedings. *Mullins and another v. Ford*, 11 Jur. 370.

*Notice of trial, error in.]* A notice of trial dated and delivered on the first day of Hilary term, for trial at the second sittings in next Hilary term, was held by the majority of the court insufficient, though it appeared that the defendant could not have been misled by it—Lord Abinger, C. B., dissentiente. *Benthall v. West*, 1 Dowl. & L. 599.

*Notice of countermand of trial.]* The two days' notice of countermand of trial, required by the rule of H. T. 2 Will. 4, s. 6, must be two business days; and notice on Saturday for Monday is not sufficient. *Rose v. M'Gregor*, 12 Mee. & W. 517; 1 Dowl. & L. 583.

*Countermand of notice of trial, given at the assizes.]* Where countermand of notice of trial is given after the commission day, and the

record is not withdrawn, the proper course is, on the cause being called on, to nonsuit the plaintiff. *Haworth v. Whalley*, 1 Car. & K. 586.—*Cresswell, J.*

*Notice of countermand of notice of trial.]* A notice of countermand of trial, given in the country, may be signed by the country attorney, though the London agent is the attorney on the record. *Cheslyn v. Pearce*, 1 Mee. & W. 56; 5 Law J., Ex. 106; 1 T. & G. 238.

Where notice of trial is given for an adjournment day, a notice of countermand, two days before the day to which the adjournment takes place, is too late. *Cooper v. Whitmarsh*, 4 Mee. & W. 73; 7 Law J., Ex. 240.

*Notice of trial mis-read by defendant's attorney and cause tried as undefended.]* Defendant's attorney, on the 2nd November, had notice of trial for the 10th, the sittings in term. On the 11th, it was tried as an undefended cause. The court refused a new trial, upon an affidavit by the defendant's attorney that he had mis-read the notice as a notice for the sittings after term, being of opinion that he had been guilty of gross negligence, and there being no affidavit by the defendant himself. *Nash v. Swinburne*, 11 Law J., C. P. 56.

*Notice of trial, judgment irregularly signed having been set aside.]* On the 7th April, the defendant obtained an order for time to plead, taking short notice of trial, but not having pleaded in due time, the plaintiff signed judgment, which the court afterwards set aside. The defendant pleaded on the 1st May; on the 14th the plaintiff delivered a replication, but afterwards abandoned it, and delivered another on the 19th May, with a rejoinder added. On the 23rd, he delivered the issue indorsed with notice of trial for the 28th, and on that day, the defendant being absent, obtained a verdict. The court held, that as the effect of the order of the 7th of April was removed by the judgment signed, the notice of trial was irregular, and the verdict must be set aside with costs. *Drake v. Pickford*, 15 Law J., Ex. 346.

### NOTICE TO PRODUCE.

*Notice to produce.]* In a town cause, a service of a notice to produce, by putting the notice into the letter-box at the office of the attorney, in London, on the evening before the trial, is not a good service. *Lawrence v. Clark*, 15 Law J., Ex. 40; 14 Mee. & W. 250; 2 Dowl. & L. 87.

In an action on a bill of exchange, where the only issue was that the acceptance was obtained by fraud and covin, defendant cannot compel plaintiff to produce the bill in support of the plea, unless he has given a notice to produce. *Ib.*

A notice to produce, served twenty miles from the place of trial, at eight o'clock in the evening of the day before the trial, upon the attorney, who had not the papers in his possession, the defendant being absent at the time, is insufficient. *Howard v. Williams*, 11 Law J., Ex. 279.

Notice to quit may be proved by a copy, without any notice having

been given to produce the original. *Doe d. Fleming v. Somerton*, 14 Law J., Q. B. 210.

A notice to produce served by the defendants on the plaintiffs, giving them notice to produce "all letters written to and received by you between the years 1837 and 1841, both inclusive, by and from the said defendants, or either of them, during the time aforesaid, or by or to any person on their or your behalf respectively," is good, and is not too general, although it does not specify the date of each particular letter. *Morris v. Hannen*, 1 Car. & M. 29.

In a town cause for goods sold, in which the defendant and his attorney both lived in town, a notice to produce a letter from the plaintiff to the defendant, asking payment, was served at the office of the defendant's attorney, at 7 p.m., on the evening of the day before that on which the cause was tried:—Held, to be not too late, and the letter not being produced, secondary evidence was given of its contents. *Leaf v. Butt*, 1 Car. & M. 451.—Alderson, B.

A notice to produce a letter on the subject of the promissory note on which the action was brought, and was an answer to a letter from the plaintiff to the defendant on the same subject, served on the plaintiff's attorney at a quarter before 9 o'clock on the night before the trial:—Held, too late. *Holt v. Miers*, 9 Car. & P. 191.—Abinger, Lord.

Where the commission day was Thursday, a cause tried on the following Monday; a notice to produce served on the previous Saturday, the attorney and the client living in the assize town:—Held, good, *Firkin v. Edwards*, 9 Car. & P. 478.—Williams, J.

Notice to produce must be served before the commission day on parties living away from the assize town. *Trist v. Johnson*, 1 M. & R. 259.

Where the attorney in a cause has been changed, a notice to produce served (before the change) on the first attorney is sufficient to call for production of the paper at the trial. *Doe d. Martin v. Martin*, 1 M. & R. 242.

A notice to produce, served on a defendant in London on a Saturday, the cause being tried on the following Monday, is too late: notice to produce ought to be served on the attorney, if there be one. *Houserman v. Roberts*, 5 Car. & P. 394.

### NUL TIEL RECORD.

*Nul tiel record—pleading.]* Where a plea of nul tiel record concluded to the country, and the plaintiff replied that there is such a record, concluding with a verification by the record, and gave notice of trial by the record, it was held, that as the plea tendered a perfect issue without a conclusion to the country, the plaintiff was entitled to treat those words as surplusage, and to reply over. *Townsend and another v. Smith*, 15 Law J., Q. B. 93; 3 Dowl. & L. 323.

*On plea of nul tiel record a variance cannot be amended by the court.]* In a variance on an issue raised under a plea of nul tiel record, a judge sitting in banc is not empowered to amend the pleadings by the stat. 3 & 4 Will. 4, c. 42, s. 23. *Daris v. Dunn*, 1 Dowl. N. S. 31; 6 Jur. 263, B. C.—Patteson, J.

*Plea nul tiel record—variance.]* In an action of debt on a judgment brought against L. B., and E., his wife, the declaration alleged that the plaintiff, on, &c., recovered judgment against the said E. by the name of E. R., in an action on promises, which promises were made by her, the said E., whilst she was sole and unmarried. Plea, nul tiel record. On the judgment being produced in court, it appeared to have been recovered against E. R. and others :—Held, this having been objected to on the ground of variance, that such objection was invalid; and that the objection, if any, should have been taken by plea in abatement. *Cocks v. Brewer*, 11 Mee. & W. 51.

*Plea of nul tiel record—award of venire and distringas cancelled.]* On plea of nul tiel record it is no objection that the award of the venire and the distringas are cancelled by lines being drawn across them. *Hodgson v. Chetwynd*, 3 Dowl. & L. 45; 14 Law J., Ex. 264.

*Replication of nul tiel record.]* A replication of nul tiel record, although it conclude with an ordinary verification, does not require counsel's signature, and the erroneous conclusion does not render it a nullity, so as to entitle the defendant to sign judgment of non pros. *Thompson v. Nicholas*, 10 Mee. & W. 330; 2 Dowl. N. S. 226; 11 Law J., Ex. 384.

*Issue of nul tiel record—rule to produce the record.]* Where, upon an issue of nul tiel record, the plaintiff gave notice to the defendant to produce the record :—Held, that not having given a four-day rule, he could not move for judgment for not producing it. *Begbie v. Grenville*, 3 Dowl. 502, Ex.

*Plea of nul tiel record to scire facias.]* The plea of nul tiel record to a declaration in scire facias to revive a judgment does not put in issue the venue in the original action. *Phillips v. Smith*, 12 Law J., Q. B. 187.

*Notice that plaintiff will produce record—rule for defendant to produce.]* Where the plaintiff is bound to produce the record of another court, he may give a notice to the defendant that he will produce it; but where the record is to be produced by the defendant, the plaintiff must give him a four-days' rule to produce it. *Swinburn v. Taylor and another*, 11 Law J., Ex. 10; 9 Mee. & W. 43.

*Nul tiel record—rule for judgment—variance—affidavit.]* Where, to an action on a judgment, the defendant pleads nul tiel record, and the plaintiff joins issue, and gives notice of trial, no rule for judgment is necessary.

Where, to a general declaration on a judgment, the defendant pleads nul tiel record, it is no variance that the record produced shows the judgment to have been obtained by default in payment of certain instalments, as directed by a judge's order; and per Alderson, B., a variance between the pleadings and the record produced may be amended under 9 Geo. 4, c. 15.

The court refused to receive affidavits to show that the roll was

brought in since issue joined. *Hopkins v. Francis*, 13 Mee. & W. 668; 14 Law J., Ex. 207; 2 Dowl. & L. 664.

*Costs on judgment on nul tiel record—action—debt on judgment.]* Where in an action of debt upon a judgment, to which the defendant pleaded nul tiel record, a motion was made to the court, under 43 Geo. 3, c. 46, s. 5, for judgment in the suit upon the production in court of the record of the original judgment and costs, the court refused to grant a rule absolute in the first instance, as costs were demanded, although notice of the motion had been given. *Fraser, P. O. v. Moses*, 1 Dowl. N. R. 705.

*Costs on judgment on nul tiel record.]* The plaintiff having brought an action of debt in the Exchequer, on a judgment recovered in an inferior court, instead of removing it to the superior court and issuing execution, the defendant pleaded nul tiel record. The plaintiff produced the record, and applied for his costs under 43 Geo. 3, c. 46, s. 4, but the court refused the application, notwithstanding the defendant had pleaded a false plea. *Hanner v. White*, 12 Mee. & W. 519; 1 Dowl. & L. 653.

#### OFFICE COPIES.

*Necessity of taking office copies of affidavits on motions.]* Cause cannot be shown until an office copy is taken of the affidavit on which the rule nisi was obtained. *Brown v. Probert*, 1 Dowl. 659.

The practice requiring that a party obtaining a rule nisi is bound to take office copies of the affidavits of the other party on showing cause is not adhered to. *Pitt v. Coombs*, 4 Nev. & M. 535; 1 Har. & W. 13.

*Taking office copy of affidavit—waiver of objection to time of filing.]* Where affidavits had not been filed in time, but the agent of the opposite party, who was aware of this defect, applied for and obtained office copies of these affidavits:—Held, that this was a waiver of the objection. *In re Mackay and others*, 12 Law J., Q. B. 337.

*Office copies of affidavits and sheriff's notes necessary on showing cause.]* On showing cause against a rule nisi for a new trial, in a cause tried before the sheriff, the party showing cause must be provided not only with an office copy of the affidavits on which the rule has been obtained, but of the sheriff's notes also. *Walker v. Needham*, 4 Scott N. R. 221; 1 Dowl. N. S. 220.

*Office copies of affidavits at chambers.]* An affidavit used at chambers, though not filed, the adverse party is entitled to a copy. *Tebbutt v. Ambler*, 7 Dowl. 674.

*Office copies of exhibits to affidavits.]* Parties are not bound to take office copies of exhibits to affidavits. *Hawkgard and another, executors, v. Stocks*, 2 Dowl. & L. 936; 9 Jur. 451, B. C.—Coleridge, J.

*Fees on office copies.]* Fees on office copies of affidavits are public property ; and therefore such copies can in no case be dispensed with. *Westmoreland v. Pike*, 5 Law J., Ex. 56; 1 T. & G. 227; and *Brown v. Probert*, 1 Dowl. 159, Ex.

*Office copy of a document exhibited.]* Where a defendant makes an affidavit at a judge's chambers, identifying a document which is exhibited to him and not filed, he will be compelled to allow the plaintiff to take a copy of that document, although it is sworn to furnish a defence to the action. *Tebbutt v. Ambler*, 7 Dowl. 674.

## ORDERS.

*Judge's order, official stamp on copy of.]* The stamp on the copy of a judge's order, being merely the mark of the judge's clerk, will not be judicially noticed by the court. *Barrett Navigation v. Shower*, 9 Law J., Ex. 145; 8 Dowl. 173.

*Judge's order to return writ made a rule of court, and for an attachment.]* A judge's order for returning a writ cannot in the King's Bench be made a rule of court, and an attachment for disobedience thereto obtained on one motion. *Strainland v. Ogle*, 3 Dowl. 99, B. C.—Williams, J.; and *Henchcliffe v. Jones*, 4 Dowl. 86, B. C.—Coleridge, J.

In the Exchequer one motion is sufficient for making a judge's order to bring the defendant into court, or to return a writ, a rule of court, and for an attachment against the sheriff for not obeying such order. *Howell v. Bulteel*, 3 Law J., Ex. 1; 3 Dowl. 99.

An application to make a judge's order a rule of court, and for an attachment for disobeying it, may be made on the same motion. *Henchcliffe v. Jones*, 4 Dowl. 86.

In the Exchequer, to make a judge's order a rule of court, and for an attachment, may be moved for at the same time. *Forster v. Kirkwall*, 4 Dowl. 370, Ex. This applies only to orders on the sheriff to return writs, &c. See above, *Howell v. Bulteel*. In the Common Pleas two motions are necessary. *Pilcher v. Woods*, 4 Dowl. 329.

*Several orders in the same matter may be made a rule of court.]* Orders to the number of eleven, of different judges, enlarging the time for making an award, were made a rule of court by a single rule. *In re Tribe*, 3 Ad. & E. 295.

*The power of a judge to make an order cannot be questioned after the order has been made a rule of court.]* After an order of a judge at chambers has been made a rule of court, it is too late to object, in answer to a rule calling upon the party to pay money in pursuance of such order, that the judge had no power to make it. *Wilson v. Northorp*, 4 Dowl. 441; 2 C. M. & R. 326; 5 Tyrw. 1102.

*Making a judge's order a rule of court in vacation.]* A judge's order was dated and granted in vacation on the 14th July. On the 16th July the order was made a rule of court, the rule being drawn up as of Trinity term, but dated the 16th July :—Held, that the rule was

regular in making the order a rule as of Trinity term, although such order was dated and granted in vacation. *Badman v. Pugh*, 2 Dowl. N. S. 907, C. P.; 5 Man. & G. 381.

To ground an attachment a judge's order made in vacation cannot be made a rule of court as of the preceding term. *Rex v. Price*, 2 C. & M. 212; 2 Dowl. 233; 4 Tyrw. 60.

*Judge's order made on a rule returnable at chambers.]* The court will not entertain a motion to set aside the order of a judge at chambers made on a rule drawn up to show cause there. *Reg. v. Sheriff of Lancashire*, 4 Jur. 538, Ex.

*Judge's order for payment of money made a rule and fi. fa. thereon.]* A judge's order for the payment of money having been made a rule of court, the plaintiff issued a fi. fa. upon it, under 1 & 2 Vic. c. 110, s. 18, and levied as well the sum ordered to be paid as the costs of making the order a rule of court. The court set aside so much of the execution as related to the costs of making the order a rule of court. *Barchead v. Hall*, 9 Law J., Ex. 323.

*Costs of making a judge's order a rule of court.]* By Reg. Gen. T. T. 3 Vic. the costs of making a judge's order a rule of court is absolute in the first instance, and is incorporated in the rule making the order a rule of court, provided an affidavit be made and filed, that the order has been served on the party or his attorney, and disobeyed. 6 Mee. & W. 603.

Under the above rule making a judge's order a rule of court, with costs to be paid by the party against whom the order is made, is absolute in the first instance, if there be an affidavit as required by the rule of court. *Black v. Lowe*, 10 Jur. 953, Exch.; 16 Law J., Exch. 56.

*Judge's order must be served to operate as a stay of proceedings.]* The rule of practice that an order must be drawn up and served before the other party is in a situation to take a fresh step, in order to operate as a stay of proceedings, applies to an order to amend on payment of costs to be taxed. *Normanby v. Jones*, 3 Dowl. & L. 143, B.C.—Wightman, J.

*A judge's order unless served in due time is a nullity.]* A judge's order ought to be served before the opposite party can take any step; and therefore an order for three days to join in demurrer, obtained at five o'clock on one day and not served till two o'clock on the following day, on which day, at the opening of the office at eleven o'clock, the other party signed judgment, was held to have been served too late. *Kenny v. Hutchinson*, 6 Mee. & W. 134; 9 Law J., Ex. 60; Dowl. 171.

*Orders nisi at chambers.]* An order nisi to attend a judge at chambers makes itself absolute; and if no one appears at the proper time to support it, the party showing cause should go in to the judge and apply to have it discharged; otherwise it will become absolute. *Humphreys v. Jones*, 6 Mee. & W. 418; 9 Law J. Ex. 168; 8 Dowl. 408.

*A judge's order may be drawn up by either side.]* A party obtaining a judge's order is not bound to draw it up, but his adversary may obtain an order for leave to draw it up. *Macdougall v. Nicholls*, 5 N. & M. 367.

*The words "by consent" improperly inserted in the judge's order, how corrected.]* A party cannot apply to the court to rescind a judge's order, which appears on the face of it to have been made by consent, and if the words "by consent" have been improperly inserted, application should be made to the judge to set it right. *Hall v. West*, 1 Dowl. & L. 412, Ex.

*A judge's order for the payment of money will not be granted ex parte.]* A judge's order for the payment of money, obtained for the purpose of its being made a rule of court, and the foundation of an execution under 1 & 2 Vic. c. 110, s. 18, cannot be granted ex parte. *Rickards v. Patterson*, 8 Mee. & W. 313; 10 Law J., Ex. 272.

*Judge's order for inspection of documents, rescinding of.]* A judge at chambers made an order that the defendant's attorney should inspect and take a copy of the promissory note on which the action was brought. No affidavit was produced, showing the grounds of the application for such order. The court refused to interfere to rescind such order. *Woolner and another v. Devereux*, 10 Law J., C. P. 207.

*Judge's order—reviewing the decision of the judge.]* The court will not, unless a strong case be made out, review the decision of a judge at chambers, as to costs. *Sheriff v. Gresley*, 4 Ad. & E. 338; 5 Law J., K. B. 7; 5 N. & M. 491.

Where a judge at chambers has discharged a rule for staying proceedings, on the application of the party by whom it was obtained, and after hearing both parties, the court will not set aside the judge's order for irregularity, if not resisted at the time or at the first reasonable opportunity. *Dunsday v. Hughes*, 5 Law J., C. P. 333.

*On a motion to rescind judge's order additional affidavits may be used.]* Although, on an application to rescind a judge's order made under 1 & 2 Vic. c. 110, for the arrest of a defendant, or for refusing to discharge him out of custody, either party, on cause being shown, may produce additional affidavits, yet those used before the judge at chambers ought to be brought before the court. *Heath v. Nisbett*, 11 Mee. & W. 669; see also **BAIL**, **HOLDING TO**.

*Judge's order to exempt an executor plaintiff from costs.]* An order to exempt an executor plaintiff from costs after a verdict for the defendant, is a matter within the discretion, either of a single judge, or of the whole court; and if a single judge has made an order, such order cannot be reviewed; the decision, either of the whole court, or of a single judge, being final. *Maddock v. Phillips*, 5 N. & M. 370.

*Moving to rescind judge's order.]* An affidavit in support of a rule to rescind a judge's order need not take notice of a previous application for the same purpose made at chambers, and refused: unless it

be necessary to do so in order to account for apparent delay in making the application to the court. *Thomas v. Evans*, 9 Mee. & W. 829.

Where a judge at chambers has made an order, and an application has been afterwards made to him to rescind that order, and he has refused to do so, this court will not interfere to rescind his second order. *Thompson v. Beck and another*, 12 Law J., Q. B. 305.

*Motion to rescind part of a judge's order.]* Where the plaintiff applied for a judge's order to set aside judgment and execution for irregularity, and the judge made an order to set aside "the judgment and execution, without costs; no action to be brought," he cannot, after he has served the order, apply to set aside so much of it as directs that no action should be brought. *Pearce v. Chaplin*, 10 Jur. 966, Q. B.; 16 Law J., Q. B. 49.

*Demand of costs under a judge's order.]* Costs due under a judge's order and allocatur thereon are payable on demand. Therefore, where costs due from a defendant under a judge's order were demanded from the town agent of the defendant's attorney, who did not pay them, alleging that he had no instructions to do so, but would write into the country and advise payment:—Held, that the order was disobeyed, and that the defendant was liable to the costs of making it a rule of court, under Reg. Gen. May 27th, 1840. *Thompson v. Billing*, 11 Mee. & W. 361.

*Abandoning a judge's order.]* Where an order for particulars was obtained and served, and the defendant afterwards, and before any particulars were delivered, served a demand of declaration, at the bottom of which was a notice, that he had abandoned his order for particulars:—Held, that this was irregular, and that he ought to have got rid of the order for particulars before the demand of the declaration; and the court set aside a judgment of non pros. which had been signed for want of a declaration. *Solly v. Richardson*, 6 Dowl. 774, B. C.

A plaintiff who obtained an order to be at liberty to amend his writ is not obliged to draw it up; and if he gives notice of abandoning the order and the writ, and the defendant afterwards appears, a judgment of non pros. for not declaring is irregular. *Ib.*

A judge's order must be drawn up and served forthwith, or it must be considered as waived by the party by whom it has been obtained. *Charge v. Farhall*, 4 B. & C. 865; 6 D. & R. 422; and *Kenny v. Hutchison*, 8 Dowl. 171, Ex.

Where the defendant had obtained, after declaration, an order for particulars, and that proceedings should, in the mean time, be stayed, which he had served:—Held, that he might afterwards serve notice on the plaintiff that he abandoned the order for particulars, and at the same time deliver a plea, without obtaining a judge's order to rescind the original order. *Maunder v. Collett*, 16 Law J., C. P. 17.

*Order of Nisi Prius.]* The court in Banc has no jurisdiction to amend an order of Nisi Prius until it has been made a rule of court. *Cranch v. Tregoning*, 5 Dowl. 230.

## OUTLAWRY.

*Proceedings in outlawry.]* Proceedings to outlawry cannot be taken on a writ of *distringas* originally issued to compel an appearance. *Vere v. Gowar*, 5 Dowl. 294; 3 Bing. N. S. 503.

A *distringas* with a view to outlawry may issue in continuation of writs previously sued out to save the statute of limitations. *Ray v. Dow*, 5 Dowl. 310, Ex.

A writ of *capias* may be issued into a county different from that in which the writ itself describes the defendant as resident; and proceedings to outlawry founded on such a writ are regular. *Morris v. Davies*, 4 Dowl. 317, B. C.

A *capias* or *distringas* issued with a view to outlawry must be lodged with the sheriff fifteen days at least before it is returnable. *Norman v. Winter*, 7 Scott, 251.

*As to applications by an outlaw.]* An outlaw cannot come into court for the purpose of enforcing a demand or establishing a right, but he may apply to the court to set aside a writ of *ca. sa.*, which has irregularly issued against him. *Walker v. Thelluson*, 11 Law J., Q. B. 14.

*A ca. sa. for the purpose of outlawry cannot issue against a member of Parliament.]* It is irregular to sue out a *capias ad satisfaciendum* against a member of the House of Commons, during the time his privilege continues. And it makes no difference that the party at whose instance the *ca. sa.* is issued declares that the writ is sued out, not for the purpose of arresting the defendant, but in order to ground proceedings to outlawry, to take effect when the privilege shall expire. *Cassidy v. Stewart, M. P.* 10 Law J., C. P. 57.

*A capias utlagatum may issue after the death of plaintiff.]* Where a plaintiff dies before judgment, a special *capias utlagatum* may issue against the defendant. *Rees v. Longwell*, 8 Law J., Q. B. 128.

*Return to writ of capias utlagatum may be amended.]* The sheriff to the writ of *capias utlagatum* returned "no goods, nor any lay fee within his bailiwick, but that the defendant was a beneficed clergyman." The court refused a rule for a sequestration, but intimated that the sheriff should be called upon to amend the return. *Rex v. Powell*, 1 Mee. & W. 321.

Upon the return of special writs of *capias utlagatum*, that the defendant was possessed of benefices, but of no lay fee, the court ordered, upon reading the transcript of outlawry and the inquisition, a sequestration. *Rex v. Hind*, 1 C. & J. 389; 1 Tyrw. 347.

*Writ of sequestration after return of capias utlagatum.]* Where the sheriff returns to a writ of *capias utlagatum* that the defendant has no goods nor lay fee without his bailiwick, but is possessed of a rectory, the court will award a writ of sequestration. *Rex v. Armstrong*, 2 C. M. & R. 205; 4 Law J., Ex. 167.

*Terms of reversal of outlawry.]* Under a writ of attachment issued in February, 1838, (in an action on foreign bills of exchange for upwards of 7,000*l.*) goods of the defendants, who were merchants carrying on business in the United States, were seized and sold; out of the proceeds of which the plaintiffs received upwards of 4,000*l.* On application to reverse the outlawry, the court directed that it should be reversed on payment of all costs, and on entering a common appearance, and that the money received under the levy should be invested in exchequer bills, and deposited with the officer of the court, to abide the event of the suit.

Where on an application to reverse an outlawry, the court see sufficient grounds for believing that the defendant does not intend to remain in this country, and that the circumstances are such as that a judge would order a writ of attachment to issue under the 1 & 2 Vic. c. 110, s. 3, it seems that they will still impose on the defendant the condition of putting in special bail. *The Bank of England v. Reid*, 7 Mee. & W. 159.

*Outlaw—application to the Insolvent Debtors Court.]* Where a prisoner was in custody under a writ of attachment for non-payment of damages and costs in an action for criminal conversation; the court held him entitled to apply to be discharged under the 7 Geo. 4, c. 57, although the outlawry was not reversed. *Reg. v. Insolvent Commissioners*, 3 N. & P. 543.

But in another case it was held, that an outlaw is not entitled to be discharged under the Insolvent Debtors Act. *Hamblin v. Crossely*, 8 Ad. & E. 677.

A party outlawed on civil process after judgment, and, on his petition subsequently made to the Insolvent Debtors Court, adjudged to be discharged, is not entitled to a reversal of the outlawry, though the debt on which the outlawry is founded be included in his schedule. *Dickson v. Baker*, 1 Ad. & E. 853; 3 N. & M. 775.

Where a defendant had been outlawed, but had been discharged by the Insolvent Debtors Court from the judgment in respect of which the outlawry took place, the court allowed him to be heard in opposition to a motion made by the plaintiff to charge him in execution on the same judgment. The effect of such discharge by the Insolvent Debtors Court is to relieve the defendant, not only from the judgment in the action, but from the outlawry also, and there was nothing to charge in execution. *Abthorpe v. Fisk*, 6 Bing. N. S. 17; 8 Dowl. 66.

*Outlaw—moving to set aside irregular proceedings.]* Where an outlawry is not perfected until after a rule nisi has been obtained by the outlaw to set aside irregular proceedings, though it is perfected before the rule is made absolute, he is entitled to be heard to make the rule absolute. In such a case, the court refused to grant the plaintiff the costs of opposing the rule. *Burn v. Manning*, 12 Law J., Q. B. 4.

An outlaw may appear in court during the continuance of his outlawry, for the purpose of protecting himself from irregular proceedings against him, though he cannot take steps solely for his own benefit. *Davis v. Trevannion*, 14 Law J., Q. B. 138.

*An outlaw cannot tax a bill of costs.]* An outlaw will not be allowed

to make an application to the court to compel the delivery of an attorney's bill, or to refer to taxation a bill of costs already delivered, for this is an application for the benefit of the outlaw within the rule which prohibits an outlaw from making an application for his own benefit. *In re G. S. Ford*, 10 Jur. 757, Q. B.; and *in re Mander*, 6 Q. B. 867.

*An outlaw can only appear in court to reverse an outlawry.]* The defendant having been outlawed in May, 1836, in an action subsequently brought against him obtained judgment as in case of a non-suit against the present plaintiff:—The court held, that the defendant had no locus standi, and in attempting to enforce his judgment he cannot use the process of the court. *Aldridge v. Buller*, 2 Mee. & W. 412; 5 Dowl. 733.

*On outlawry the personal property immediately vests in the crown.]* After outlawry, but before the issuing the capias utlagatum, a fieri facias issued at the suit of judgment creditors:—The court held, that they thereby acquired no priority over the claim of the prosecutor of the outlawry to have the proceeds upon a grant from the Treasury. By bare outlawry, the personal goods become immediately forfeited and vested in the king, and there is no distinction between an outlawry at the suit of an individual and at the suit of the crown. *Rex v. Cooke*, 1 M'Clel. & Y. 197.

*Appearance in outlawry—amendment of writ.]* After an appearance in outlawry the court will not allow the writ to be amended. *Green v. Kettleby*, 6 Mee. & W. 731; 8 Dowl. 783.

*Outlawry—setting aside and staying proceedings.]* On a motion to set aside proceedings to outlawry, on the ground of irregularity, being a variance from the forms of the indorsement on the capias given by the Uniformity of Process Act:—The court held, that the rule could only be drawn up on reading the original writ. *Lewis v. Davison*, 1 C. M. & R. 655; 3 Dowl. 272.

Where it was sworn, and not denied by the plaintiff, that he knew where the defendant lived during the time of suing out the process, the court set aside the judgment with costs. *James v. Jenkins*, 9 Moore, 590.

Where the plaintiff knowing that the defendant was abroad, but was represented by an attorney, proceeded to outlawry, without making any application to such attorney, the court set aside the outlawry as an abuse of process. *Pigou v. Drummond*, 1 Bing. N. S. 354.

Where the last proclamation was in August, and the defendant did not apply to set aside the proclamation until the Michaelmas term, he appearing to have known of the commencement:—Held, too late. *Anderson v. Alexander*, 2 Dowl. 267.

The court will not set aside an outlawry merely on the ground of the defendant having constantly appeared in public during the proceeding against him:—Semble, that the court would set it aside if it appeared that the party had notice of them. *Johnson v. Driver*, 1 Dowl. 127, B. C.

Upon a joint outlawry, the costs of setting aside can only be recovered jointly. *Jenkins v. Biddulph*, 4 Bing. 160.

The court will not set aside proceedings in outlawry for irregularities appearing on the face of the proceedings, in a case in which a rule nisi for reversing the outlawry had, upon cause shown, been already discharged; but will leave the party to his writ of error. *Stultz and another v. Wyatt*, 14 Law J., Q. B. 55.

Where the plaintiff was an outlaw at the time of bringing his action, but the defendant did not know of it till after plea pleaded, and notice of trial given, the court, after verdict, granted a rule to stay the proceedings, which was afterwards discharged on the reversal of the outlawry. *Somers v. Holt*, 8 Dowl. 506.

*Reversal of outlawry.]* On motion for reversing an outlawry on payment of costs, and on the defendant putting in and perfecting bail in the alternative of satisfying the judgment or rendering the defendant; a preliminary objection was taken, that it did not appear on the affidavit in support of the rule that the application was made at the instance and by the authority of the outlaw. The court were clearly of opinion, that, where the party did not appear in person, it should be expressly stated in the affidavits that the attorney was authorized by him to make the application on his behalf. Rule discharged. *Plunkett v. Buchanan*, 3 B. & C. 736; 5 Dowl. 625; and *Holditch v. Swinfeu*, 3 Scott, 169; 5 Dowl. 36.

On motion to reverse an outlawry, it appeared that the party was beyond seas at the time of the exigent being awarded. The court adopted the rule in C. P., of reversing the outlawry on payment of costs, and on bail being put in in the alternative. *Levi v. Claggett*, 5 Dowl. 322; 1 M. & W. 547.

The defendant having mortgaged fee-farm rents, had entered into a contract for sale to the mortgagee, pending which the latter died, and the plaintiff, his representative, had proceeded to outlawry against the defendant whilst abroad, but having an agent here to the knowledge of the plaintiff, the court reversed the outlawry on terms, with costs. *Pigou v. Drummond*, 4 Scott, 573; 2 Bing. N. S. 114.

On a writ of error to reverse an outlawry because the defendant was beyond seas, (if it be any answer that he went there for the purpose of avoiding the outlawry,) it is enough that he went to avoid outlawry in the action; it need not appear that he went in contemplation of the particular proceedings which did actually terminate in the outlawry. *Bryan v. Wagstaff*, 2 C. & P. 125; 1 Ry. & M. 329.

The sheriff having once seized under a writ of capias utlagatum, becomes accountable to the crown, and, on the reversal of the outlawry, the application to restore must be by amoveas manus in the Exchequer. *Croft v. Lord Percival*, 7 Scott, 847.

Where a plaintiff proceeded against a defendant here and in America for the same cause of action, and the defendant was arrested in America, and took the benefit of the Insolvent Act here, the court would not, on that ground, set aside the proceedings to outlawry which had been taken here, but left the defendant to plead these facts, it being sworn that he went abroad to avoid his creditors. *Probert v. Rogers*, 3 Dowl. 170.

If the king's warrant, and the attorney-general's consent, for the payment of money in the sheriff's hands under a writ of capias utlagatum to the plaintiff, be granted in ignorance of the previous death of the defendant, the court, on a plea by his representatives, suggesting the

death, will postpone making an order for such payment, until the fact of the death is determined, on a confession or denial of the plea.

The proofs required by the court for the purpose of reversing an outlawry by reason of the death of the defendant must be regulated by circumstances; and, therefore, when a party died in France, the court considered an affidavit that the party died on a day named, and the deponent had seen him in his coffin, sufficient. *Rex v. Buchanan*, 1 C. & M. 125; 3 Tyrw. 229; 2 Law J., Ex. 12.

## OYER.

*Oyer demanded after plea.*] The court held, that a defendant had not waived his right to demand oyer by having pleaded, and he is only entitled to have it entered of record when made in due time; but that, when the time to plead was extended, without excepting the right to demand oyer, he should have the same time to plead after allowance of oyer as he would have had under the judge's order. *Goodricke v. Turley*, 2 C. M. & R. 694; 4 Dowl. 431.

*Demand of oyer.*] A demand of oyer must minutely describe the parties to the cause. *Poole v. Coates*, 3 Scott, 768.

*Oyer of an administration bond.*] The court will not permit an inspection of an administration bond at the office of the Registrar in Doctors' Commons to be deemed good oyer, although a copy has been accepted by the defendant's attorney, and the Ecclesiastical Court has refused to allow the bond to be produced at the office of the defendant's attorney. *Archbishop of Canterbury v. Tubb*, 5 Dowl. 627; 3 Bing. 789; 4 Scott, 543.

*A deed set out on oyer becomes part of the declaration.*] A declaration in covenant set out the deed according to its legal effect, and the defendant set it out on oyer in *hæc verba*. The court held he could not demur to the declaration on the mere ground of variance, because the deed, as set out on oyer, becomes part of the declaration. *Paine v. Emery*, 2 C. M. & R. 304; and *Alton v. Freeslun*, 2 M. & G. 1.

*Indenture pleaded if oyer craved must be set out.*] Where a defendant pleads an indenture, and the plaintiff craves oyer, and then without setting forth the indenture on the record, replies non est factum, and adds the similiter for the defendant, and delivers the issue with notice of trial, the defendant may return the issue, and pray that the deed may be inrolled; and if the plaintiff afterwards proceed to trial upon the issue as originally delivered, it is irregular, and the court will set aside the verdict. *Smith v. Jennings*, 9 Dowl. 155.

*Oyer—as to setting out plan referred to in indenture set out.*] The defendant in his plea set out a lease on oyer, which contained amongst other things, the demise of certain ponds and pools, "for the better description whereof a plan is indorsed on the second skin of these presents:"—Semble—that it was not necessary to set out on oyer the

plan referred to in the indenture. *Newton v. Wilmet, Bart.*, 10 Law J., Exch. 476.

## PARTICULARS OF DEMAND.

*An order for particulars of demand must be served on the attorney, not the plaintiff.]* A judge's order calling on the plaintiff's attorney or agent, to furnish the defendant's attorney or agent with a better bill of particulars, is not satisfied by the service of such order upon the plaintiff; it should be served on his attorney or agent. *Stevens v. Underwood*, 6 Law J., C. P. 20.

*Credit in particulars of demand.]* In assumpsit for goods, the particulars contained an item of payment, "Cr. by bills 1,500l.:"—Held that it was to be taken as a payment by the defendant to the plaintiff. *Smethurst v. Taylor*, 12 Mee. & W. 545.

The court will not compel a plaintiff to state the items of sums for which he has voluntarily given credit in his particulars. *Myatt v. Green*, 13 Mee. & W. 377.

Where a plaintiff gives credit in his particulars of demand for a sum paid by the defendant, such payment is put on the same footing as if there had been a plea of payment; but it cannot be taken as an admission as against the defendant, with respect to any of the items in the entire account. *Goatley v. Herring*, 12 Law J., C. P. 32.

*Particulars containing various causes of action—plea of payment.]* If to a declaration in the ordinary form in indebitatus assumpsit, with particulars containing various causes of action, the defendant pleads payment into court, he is not precluded by his plea from contesting his liability in respect of any items beyond the amount paid into court, as the particulars are not to be considered as part of the declaration. *Booth v. Howard*, 5 Dowl. 438.

*An order for particulars of demand is a stay of proceedings by defendant as well as plaintiff.]* Where an order for particulars was obtained and served, and the defendant afterwards, and before any particulars were delivered, served a demand of declaration, at the bottom of which was a notice that he had abandoned his order for particulars:—Held, that this was irregular, and that he ought to have got rid of the order for particulars before demand of declaration; and the court set aside a judgment of non pros. which had been signed for want of a declaration. *Wickens v. Cox*, 4 Mee. & W. 67; and *Burgess v. Swayne*, 7 B. & C. 485.

*Particular—declaration on a bill of exchange.]* A particular need not be given where the declaration is only on a bill of exchange or note. *Brooks v. Farlar*, 5 Dowl. 361; 1 Bing. N. S. 291.

*Particulars—declaration on a bill of exchange and goods sold.]* If the declaration is on a bill of exchange, and for goods sold, and a particular of demand is obtained on a judge's order, the plaintiff may recover on the bill, though it is not mentioned in his particular of demand. *Cooper v. Amos*, 2 C. & P. 267.

*Particulars—declaration containing two counts on a bill of exchange.]* The declaration contained two counts, each on a bill of exchange. The particulars stated the action to be brought to recover the amount of the bill mentioned in the first count, with interest, and that the plaintiff would rely on the whole or any part of the declaration for the recovery thereof:—Held sufficient to entitle the plaintiff to proceed on the second count. *Hay v. Fisher*, 2 Mee. & W. 722.

*Particulars of demand—declaration on bills of exchange.]* Where the sum indorsed on the writ for bail was 260*l.* 6*s.* 4*d.*, and 3*l.* 10*s.* for costs, and the declaration contained two counts on two bills of exchange, amounting together to 500*l.*, and the plaintiff stated on delivering his declaration, that the particulars of his demand were contained in these counts, the defendant having obtained an order at chambers, for better particulars, Lord Abinger, C. B., Bolland, B., and Gurney, B., refused to rescind that order—(dissentiente Alderson, B.) *Dawes v. Anstruther*, 2 Mee. & W. 817; 6 Law J., Ex. 194; 5 Dowl. 738.

*Particulars of infringement of patent.]* The Court of Common Pleas will not compel the plaintiff, in an action brought for the infringement of a patent, to furnish the defendant with the particulars of such infringement, if the granting of such an application would be likely to embarrass the plaintiff. *The Electric Telegraph Company v. Nott and others*, 11 Jur. 590, C. P.

*Amendment of particulars.]* In an action for work and labour, the plaintiff, in September, 1837, delivered a bill of particulars. The cause was, in December, 1841, referred to a barrister. There was no mention in the order of reference, of any other matters in difference. The court in June, 1842, allowed the plaintiff to amend his particulars on payment of costs, by adding certain items for services rendered at the same time, over which the original particulars extended. *Blunt v. Cooke*, 11 Law J., C. P. 321

*Amended particulars of demand.]* The acceptance of amended particulars is a waiver of any objection to those first delivered. *Jones v. Fowler*, 4 Dowl. 232, Ex.

*Particulars of demand of special damage not allowed.]* The court will not compel a plaintiff suing for the breach of an agreement, and assigning by way of special damage, that he has incurred certain expenses, to furnish particulars of such special damage. *Retallick v. Hawkes*, 1 Mee. & W. 573.

*Particulars of demand—variance in the evidence.]* Where the plaintiff in his particulars of demand had stated his claim to be for 450*l.*, for his services as clerk to the defendant, after the rate of 200*l.* per annum:—Held, that he was not entitled to prove a contract to be paid a commission on the amount of business done by the defendant.

The question, in such a case is, not whether the particulars have actually misled the defendant, but whether they were calculated to mislead a reasonable man. *Law v. Thompson*, 15 Law J., Ex. 334.

Though the particulars of demand vary from the evidence which the plaintiff adduces; yet, if the defendant appears and defends, and is not misled by them, the variance is no ground for nonsuiting the plaintiff. *Green v. Clark*, 2 Dowl. 18.

*Omission to deliver particulars is no ground to non pros.]* On motion to set aside judgment of non pros:—The court held, that the omission to deliver particulars, under a judge's order, is not a ground for signing judgment of non pros.; the penalty is only a stay of proceedings. *Sutton v. Clark*, 8 Bing. 165; 1 M. & Sc. 271; see also *Cane v. Spinks*, 7 Dowl. 27, Ex.

*Claim for damages confined to the particulars of demand delivered.]* The declaration contained two distinct breaches, one for not returning, and the other for not taking proper care of the goods; the particulars claiming damage only for the non-return. The court held, that evidence of injury was properly rejected. *Moss v. Smith*, 8 Dowl. 537; 1 Scott N. S. 25.

*Credit given in particulars delivered before action, and referred to in particulars of demand.]* In an action for work and labour, &c., the particulars stated the action to be brought to recover 77*l.* 4*s.* 11*d.*; “the full particulars exceed three folios and have been already delivered.” The former particulars were delivered before action brought, and claimed 77*l.*, the balance of 123*l.*, and acknowledged receipts by cash for 46*l.*:—Held, that this admission was not within the Rule of T. T. 1 Vic. and that the payment of the 46*l.* should have been pleaded. *Bosley v. Moore*, 8 Dowl. 375, Ex.

*Variance between particulars delivered and those on the record.]* The particulars annexed to the record varied from those delivered under an order, but which the plaintiff was not in a condition to prove. The court refused to nonsuit, but granted a new trial without costs. *Morgan v. Harris*, 2 C. & J. 461; 1 Dowl. 570.

In other cases, the court has held, that a variance in the particulars, which cannot mislead, is not material. *Harrison v. Wood*, 8 Bing. 372; 1 M. & Sc. 536; and *Fleming v. Crisp*, 5 Dowl. 454, Ex.

*Effect of the particulars of demand.]* A particular cannot be used for the purpose of explaining the pleadings in the cause. *Kilner v. Bailey*, 5 Mee. & W. 382.

It will not prevent a plaintiff, from giving evidence on a special count in his declaration, that he has not included that part of his claim in his particular of demand, as a particular is only necessary to explain the common counts. *Day v. Davies*, 5 C. & P. 340.

A particular, though not applicable to a special count, may be used to support an account stated. *Fisher v. Wainwright*, 1 Mee. & W. 480.

The particulars may be used as an admission of payment. *Kenyon v. IWakes*, 2 Mee. & W. 764; 6 Dowl. 105.

*Full particulars may be required although an account has been previously rendered.]* On a rule to show cause why full particulars should not be delivered it was contended that in all cases, according to the

spirit of the new rule, full particulars should be delivered, if required by the defendant, whether he had previously had an account rendered or not:—Held, that such particulars must be given upon the terms of the defendant paying the costs thereof, and if necessary, taking short notice of trial. *James v. Child*, 2 C. & J. 252; 2 Tyrw. 302.

*Particulars of demand—what is sufficient.]* In an action by an engineer, for work and labour and materials, a bill of particulars, giving a general account of the nature of his demand, is sufficient, as that he claims in respect of certain surveys, stating the number of miles and branches. *Higgins v. Ede and another*, 15 Law J., Ex. 77; 15 Mee. & W. 76.

The object of a bill of particulars is to control the generality of the declaration; and a defendant is entitled to such particulars of the plaintiff's demand as will give him that information which a reasonable man would require respecting the matters against which he was called upon to defend himself.

In an action by an engineer against a railway company, for surveying their line, &c., and for money paid, a general particular for surveying the country between certain places, including travelling charges and assistance, is sufficient, without specifying the number of fields surveyed, or how much of the charge is for the engineer's skill, time, and labour, and how much for travelling expenses and assistance. The particulars should specify the sums paid to the defendant's use. *Rennie and another v. Beresford and others*, 15 Mee. & W. 78; 15 Law J., Ex. 78; 3 Dowl. & L. 464.

The foregoing cases of *Higgins v. Ede and another* and *Rennie and another v. Beresford and others* allowed too great a degree of generality in bills of particulars in actions for work done for projected railway companies.

Where, in such an action, the defendant is a stranger, whom the plaintiff seeks to hold liable in consequence of his connexion with the project for establishing the railway, more particularity should be required in the bill of particulars than where the employment of the plaintiff was known to the defendant.

Semblé, per Rolfe, B., that the true principle is to see whether, in his bill of particulars, the plaintiff has given the best information he can with the view of fairly communicating to the opposite party, what it is that he is suing for. *Pritchard v. Nelson*, 11 Jur. 375.

In an action for work and labour, as a surveyor, the particulars of demand stated that the action was brought to recover a specified sum for surveying a certain number of miles between two places, which were named, at a certain rate per mile, in the year 1845. The defendant having pleaded only the general issue, and notice of trial having been given, a rule for further and better particulars was refused. *Irving v. Baker*, 15 Law J., Q. B. 322, B. C.—Wightman, J.

In an action brought by a sworn broker for the price of scrip bought for the account for the defendant, the particulars of the plaintiff's demand should state the names of the persons from whom, and the price at which the scrip was bought, and the date of the purchase within a few days. *Berkley v. De Vere*, 15 Law J., Q. B. 323, B. C.—Wightman, J.

*Non-delivery of particulars.]* The fact of a plaintiff withholding the particulars of his demand, in disobedience to a judge's order, is not a ground for discharging a defendant out of custody. *Graff v. Willis*, 5 Dowl. 715, B. C.

Where the defendant after service of the writ of summons, obtained before declaration, an order for particulars, and the plaintiff omitted to take any step for three months, the court refused to compel him to enter a stet processus. *Kirby v. Snowden*, 4 Dowl. 191, Ex.

The non-delivery of particulars with the declaration does not preclude the plaintiff from signing judgment for want of a plea. *Jones v. Fowler*, 4 Dowl. 232, Ex.

*Particulars not allowed on warranty of a horse.]* The court will not compel a plaintiff in an action for breach of warranty of a horse, to give particulars of the unsoundness complained of. *Pylie v. Stephen*, 6 Mee. & W. 813; 9 Law J., Ex. 216.

*Particulars not allowed in covenant by assignee of lease.]* In an action of covenant, by the assignee of a lease for non-payment of rent and non-repair, the court will not compel the plaintiff to give particulars with sums and dates. *Sowter v. Hitchcock*, 5 Dowl. 724.

*Particulars in trespass, trover, or on the case.]* In order to obtain particulars in trespass, trover, or on the case, there must be an affidavit, stating that the defendant does not know what the plaintiff is going for. *Snelling v. Chennells*, 5 Dowl. 80, Ex.

*Particulars in trespass not granted.]* The court will not grant particulars in an action of trespass, on the mere affidavit of the defendant, that he does not know the grievances intended to be relied on. There should be some special statement of the property. *Horlock v. Lediard*, 12 Law J., Ex. 33; 10 Mee. & W. 677.

*Particulars granted in an action for an escape out of custody.]* In an action against the marshal of the King's Bench, for an escape, he is entitled to a particular of the escape or escapes complained of, with a specification of times and places. *Davis v. Chapman*, 6 Ad. & E. 767; 6 Law J., K. B. 142; 1 N. & P. 699.

*Particulars of demand—action against an attorney for negligence.]* In an action on the case against defendant, an attorney, for negligence in transacting the assignment of a leasehold belonging to the plaintiff, per quod the plaintiff had to pay damages to the assignee, the court refused to compel the delivery of a particular of the plaintiff's demand. *Stannard v. Ullithorne*, 3 Bing. N. C. 326; 3 Scott, 771; 5 Dowl. 370.

*Particulars of demand, form of, rendering a plea of payment necessary.]* Assumpsit for work, labour, and materials. Pleas, except as to 4*l.*, non assumpsit, and a tender of that sum. The particulars stated, that "the action was brought to recover 27*l.* 10*s.* 4*½d.*, being

the balance due from defendants to plaintiff, on the account as under; after giving credit for all payments on account, and for such sums as defendants may have to set off against the plaintiff." The several items of the account were then set out, amounting to upwards of 100*l.*, which were not added together, nor was credit given for any specific payment. At the trial, the plaintiff only proved to the amount of 3*l.* 10*s.* :—Held, that he was entitled to a verdict for that sum, as there was no such admission in the particulars of specific payments on the part of the defendants, as to dispense with the necessity of a plea of payment, within the terms of the rule of T. T. 1 Vic. *Morris v. Jones and others*, 10 Law J., Q. B. 165.

*Particulars of demand admitting items of set-off and payment.]* The rule of T. T. 1 Vic. that a defendant need not plead payment of any sums, for the payment of which credit is given in the particulars, does not apply to items of set-off, admitted in the particulars of the plaintiff's demand.

Where, therefore, the plaintiff's particulars exhibited an account of items due from the defendant to the plaintiff; and, on the other side, admitted certain items by way of set-off, and certain other by way of payment, falling short of the amount due to the plaintiff, and stated that the action was for the balance; and on the trial the plaintiff proved the amount claimed by way of balance only, under a plea of set-off:—Held, that the defendant was not entitled to deduct the items admitted as set-off in the particulars for the amount proved, but that he was entitled to deduct the items admitted as payments. *Rowland v. Blakesley and others*, 11 Law J., Q. B. 279.

*Particulars of demand for balance of account—no sums expressly credited.]* Debt for goods sold and delivered. The particulars of demand stated the action to be brought for 37*l.*, being the balance of an account, the items of which were set out, amounting to 108*l.*, and no sums were expressly credited. The defendant pleaded, as to 5*l.* parcel of the monies in the declaration, a set-off, and proved it at the trial:—Held, first, that the rule of T. T. 1 Vic., that a defendant need not plead payment of any sums, for the payment of which credit is given in the particulars, does not apply to cases of set-off, and that the set-off must be considered as pleaded to the 108*l.*, and not to the balance; secondly, that even if it had been pleaded to the balance in point of law, yet the jury were properly directed to consider, whether in the balance claimed credit had not already been given for the set-off. *Townson v. Jackson*, 14 Law J., Ex. 57.

## PARTICULARS BY DEFENDANT.

*Particulars on plea of payment.]* The court refused to compel a defendant to deliver particulars of a plea of payment. *Phipps v. Sothern*, 8 Dowl. 208, Ex.

But upon a plea of payment of a sum in satisfaction of the plaintiff's demand, the defendant was ordered to furnish particulars as in case of set-off. *Ireland v. Thompson*, 6 Scott, 601; 4 Bing. N. S. 716; 7 Law J., C.P. 296.

*Particulars of set-off, with dates.]* In an action of debt, with a plea of set-off, a judge made an order that the defendant should, within a week, deliver an account in writing, with dates, of the particulars of his set-off; and in default, should be precluded from giving evidence in support of the set-off on the trial of the cause. The defendant delivered particulars without dates, subsequently to which the plaintiff replied, and the cause went to trial:—Held, first, that the judge had power to make the order; and, secondly, (dissentiente Platt, B.) that the plaintiff's replying to the plea of set-off was no waiver of the irregularity in the particulars delivered, and consequently that the judge at Nisi Prius had rightly refused to allow the defendant to give evidence of the set-off. *Ibbett v. Leaver*, 11 Jur. 415, Ex.

### PARTICULARS OF RESIDENCE.

*Particulars of plaintiff's residence.]* A plaintiff being called upon for his place of residence, gave Peele's Coffee-house, Fleet-street:—Held, not sufficient, and proceedings were stayed until he gave a better place of residence. *Hodgson v. Gamble*, 3 Dowl. 174, Ex.

An attorney, who gives a false residence of his client, without using proper means to ascertain whether it is correct or not, subjects himself to the costs which may be occasioned by moving for an attachment against him; but he is not liable to pay the costs of the action if he is bona fide unable, after proper inquiry, to give his client's residence. *Neal v. Holden*, 3 Dowl. 493, Ex.

### PAUPER.

*Order to sue in formâ pauperis.]* An order for the admission of a plaintiff to sue in formâ pauperis, made after the commencement of the suit, is irregular, and the plaintiff will, in such case, be dispaupered, or compelled to find security for costs. *Lovewell v. Curtis*, 5 Mee. & W. 158.

*Pauper admitted to sue after the commencement of a suit.]* A plaintiff may be admitted to sue in formâ pauperis after the commencement of the suit, notwithstanding the 23 Hen. 8, c. 15, the court possessing the power to admit plaintiffs to sue in formâ pauperis at common law, as well as by the statute 11 Hen. 7, c. 12. *Brunt v. Wardell*, 4 Scott N. R. 188; 1 Dowl. N. S. 229; 11 Law J., C. P. 17.

*Leave to sue in formâ pauperis pendente lite.]* After a verdict for the defendant, and a rule absolute for a new trial, the court granted a rule absolute in the first instance, giving the plaintiff leave to continue the suit in formâ pauperis. *Hall v. Ive*, 8 Scott, N. R. 715; 14 Law J., C. P. 24; 2 Dowl. & L. 610.

*Pauper plaintiff when required to give security for costs.]* Where a plaintiff, suing in formâ pauperis, will be absent from England eighteen months, the court will compel him to give security for costs, or stay his proceedings until his return. *Foss v. Wagner*, 2 Dowl. 499.

*Liability of pauper to costs antecedent to the order to sue, &c.]* Notice of trial was given on the 6th March, for the spring assizes, for 1841,

and on the same day the plaintiff was admitted to sue in formâ pauperis. A verdict was found for the defendant, and a rule to set it aside was discharged on the 9th June following. The defendant having on the 14th January, 1842, obtained a rule to set aside the judge's order to sue in formâ pauperis, the court discharged the rule.

Semble, that a party may be admitted to sue in formâ pauperis after the commencement of the action.

Quære, whether a defendant, who makes no application until after judgment signed, is entitled to the costs incurred before the making of an order to sue in formâ pauperis, the order containing no provision as to those costs. *Doe d. Ellis v. Owen*, 11 Law J., Ex. 120.

A plaintiff may be admitted by a judge's order to sue in formâ pauperis after the commencement of the suit. But the admission does not exempt him from costs previously incurred. *Pitcher v. Roberts*, 12 Law J., Q. B. 178.

A pauper may obtain an order admitting him to sue in formâ pauperis at any time during the progress of the suit; but it has no retrospective operation. And where the plaintiff obtained an order to sue in formâ pauperis, after the cause had made some progress, the court allowed the defendant, who succeeded in the action, the costs incurred by the plaintiff prior to the order, and the costs of taxation.

The words in the statute 23 Hen. 8, c. 15, s. 2, "at the commencement," mean as soon as the judge has jurisdiction. *Doe d. Ellis v. Owens*, 12 Law J., Ex. 53.

*Admission to sue in formâ pauperis—costs.]* After a plea of payment of money into court, in an action of assumpsit, the plaintiff obtained an order to sue in formâ pauperis. A judge thereupon made an order that the money should remain in court to abide the event of the cause, unless the plaintiff would take it out in full satisfaction. The defendants having obtained the verdict, the court ordered that the money should be paid out to them in satisfaction of their costs, antecedent to the order to sue in formâ pauperis.

Semble, a plaintiff may be admitted to sue in formâ pauperis after the commencement of the suit.

The action of assumpsit is within the operation of the stat. 23 Hen. 8, c. 15, s. 2. *Casey v. Tomlin and another*, 7 Mee. & W. 189; 10 Law J., Ex. 87.

*A pauper plaintiff is liable to the costs of the day for not proceeding to trial.]* A plaintiff, a pauper, gave notice of trial, and on the day on which it was to be entered, the clerk to his attorney, having been detained at the judge's chambers, issued by mistake a writ of distringas juratores instead of habeas corpora juratorum. His error was pointed out to him, but before he could amend it, and issue a writ of habeas corpora, the office closed, and he was prevented from entering the record. The cause stood in the paper, and costs were consequently incurred by the defendants:—Held, that under the rule 2 Will. 4, s. 10, the plaintiff ought to be compelled to pay the costs of the day. *Hodges, a pauper, v. Toplis and another*, 15 Law J., C. P. 195; 10 Jur. 438.

The court will, under 1 Reg. Gen. H. T. 2 Will. 4, s. 110, make absolute a rule requiring a pauper plaintiff to pay the costs of the day

for not proceeding to trial. *Gore v. Morphew*, 8 Dowl. 137, B. C.; and *Doe d. Lindsey v. Edwards*, 2 Dowl. 471, B. C.

But not so, if countermanded in due time. *Doe d. Pugh v. Price*, 11 Jur. 170, B. C.

The venue in an action brought against magistrates by plaintiff in forma pauperis, was laid in the southern division of the county of Lancaster; the cause of action arose in the northern division. By order in council, in pursuance of stat. 3 & 4 Will. 4, c. 71, the venue ought to have been laid in the northern division of the county. At the assizes, the plaintiff withdrew the record, for the purpose of amending the venue. The court ordered the plaintiff to pay the costs of the day. *Thompson v. Horuby and another*, 11 Jur. 169; 16 Law J., Q. B. 152.

*Dispaupering—liability of pauper to costs of the day.]* A pauper, who has been guilty of several defaults in not proceeding to trial, has been guilty of vexatious conduct, for which he is liable to be dispaupered.

He may also, under such circumstances, be compelled to pay the costs of the day for not proceeding to trial on occasion of the last default, and he may be compelled to do this by the same rule by which he is dispaupered. *Bedwell, a pauper, v. Coulstring*, 10 Jur. 810; 1 B. C. Rep. 97.

Where a pauper plaintiff gave notice of trial, and on the second day of the assizes withdrew his record, on the ground of its requiring amendment, the court dispaupered him. *Facer v. French*, 5 Dowl. 554, B. C.

*Pauper not entitled to costs of an issue found for him without damages, without setting off the costs of issues found against him.]* In an action on the case for seduction, the defendant obtained a verdict on two issues, either of which was an answer to the action; the plaintiff had the verdict on not guilty, but without damages; he obtained a rule to show cause why the master should not tax his costs on the first issue as the general costs of the cause, and why the defendant should not pay the amount thereof, without deducting the costs of the two issues found for the defendant:—Held, that not having recovered damages, the plaintiff was not entitled to the costs of the action, and the rule was discharged. *Boyle, pauper, v. Brandon*, MS. Exch. E. T. 1846.

But where the plaintiff, suing in forma pauperis, obtained a verdict of 40s. on the first issue, and the defendant on the other:—The court held, that the plaintiff was not liable to have the defendant's costs set off against the costs of the issue found for him. *Foss v. Racine*, 4 Mee. & W. 610; 7 Dowl. 203.

*Pauper defendant in an information by the Attorney-General.]* A party was admitted to plead in forma pauperis to an information under the excise laws, upon the usual affidavit. But the court refused an application for a copy of the information gratis; it could only allow it to be read over, and he might plead instanter or at a future day. *Attorney-General v. Dunnlie*, 2 C. & M. 393.

*Staying proceedings in a pauper cause—costs.]* A pauper is entitled

to his costs from the commencement of an action, although he is admitted to sue in that character in the progress of the suit, and therefore the defendant cannot stay proceedings on payment of the debt only. *Morgan v. Eastwick*, 7 Dowl. 543, B. C.

*Exemption of pauper from costs.]* A plaintiff suing in formâ pauperis is exempted from the payment of interlocutory, equally as of final costs. *Pratt v. Delarue*, 10 Mee. & W. 509.

*Pauper cause—plea of puis darrien continuance.]* As a general rule, the court will not uphold any agreement of compromise between a plaintiff suing in formâ pauperis and the defendant, having for its object the deprival of the plaintiff's attorney of his costs; and therefore, a plea of release puis darrien continuance was set aside by the court. Where such a plea was delivered on the 22nd April, and the application to set it aside was not made until the 8th June following:—Held, that the application was in time. *Wright v. Burroughes*, 10 Jur. 860; 15 Law J., C. P. 277.

*Rule to sue in formâ pauperis, and by prochein amy.]* The application to sue in formâ pauperis, and by his prochein amy, may be combined; and the rule for so suing need not be drawn up on reading the certificate of counsel, the latter being only for the information of the court. *Bryant v. Wagner*, 7 Dowl. 676.

*Counsel in a pauper cause.]* On the trial of an action brought in formâ pauperis, a king's counsel or serjeant may appear for the plaintiff alone, without a junior. *James v. Harris*, 7 C. & P. 257.

*Fees of officers of court in a pauper cause.]* Where a plaintiff, suing in formâ pauperis, has a verdict in his favour for 5*l.* or more:—Semble, that the officers of the court are entitled to their fees. *James v. Harris*, 7 Dowl. 257.

## PLEADING.

*Time to plead to count from rule to plead and not from demand of plea.]* The plaintiff delivered his declaration on the 5th June, indorsed “plead in four days or judgment.” The rule to plead was entered on the 6th June:—Held, that the defendant had the whole of the 10th June to plead, and that judgment signed on that day for want of a plea was irregular. *Dunn v. Hodson*, 1 Dowl. & L. 204, Q. B.

*Time for pleading in a town cause having a country attorney.]* An attorney residing more than forty miles from London is still bound (since 2 Will. 4, c. 39) to plead within four days after service of declaration and notice to plead in a London cause. *Kinder and another v. Dunford*, 10 Law J., Q. B. 131.

*Computation of time in pleading.]* Where three months' time to plead is given generally, they are to be reckoned by lunar months, and not calendar months. *Super v. Curtis*, 2 Dowl. 237, Ex.

*Time to plead pending a summons for particulars of demand.]* Where the defendant's time to plead expires during the pendency of a summons for particulars, if the summons is dismissed, he has only the rest of the day to deliver his pleas, and is not entitled to the same time which he had when the summons was returnable. *Mengens v. Perry*, 10 Jur. 742; 15 Law J., Ex. 307.

*Order for time to plead peremptorily.]* A judge's order, made by consent, that a defendant shall have until a certain day to plead peremptorily, does not preclude him from applying to a judge by summons for additional time. *Beazley v. Bailey*, 10 Jur. 906.

*Time to plead by judge's order counts from the date of the order.]* The additional time indorsed by consent on a summons after a rule to plead, is to be computed from the date of the judge's order, and not from the expiration of the time allowed by the rule to plead. *Lane v. Parsons*, 6 Law J., C. P. 26; 3 Scott, 652; 5 Dowl. 359.

*Time to plead in action for penalties, to give time to apply to parliament.]* The court will not interfere to allow a defendant further time to plead in an action for penalties, on the ground of its being sworn to be the intention of several parties to apply to the legislature for an act to relieve the parties from penalties, and that the plaintiff's attorney has consented not to oppose the bill. *Grant, q. t. v. Ridley*, 12 Law J., C. P. 151.

*Rule to plead not necessary after an order for time.]* After a judge's order, directing the defendant to plead within a given time, if no plea is pleaded within that time, the plaintiff may sign judgment without giving a rule to plead. *Nias v. Spratley*, 4 B. & C. 386; and *Nugee v. M'Donell*, 3 Dowl. 579, B. C.

A summons for time is a waiver of the rule to plead. *Bolton v. Manning*, 5 Dowl. 769, Ex.

*Rule to plead—when to be given.]* When a rule to plead is given before notice of declaration, it is irregular; but the irregularity is waived by taking out a summons for time to plead. *Pope v. Mann*, 2 Mee. & W. 881.

There is no irregularity in entering a rule to plead before notice of declaration, but on the same day. *Aitman v. Conway*, 3 Mee. & W. 71; 6 Dowl. 76; and *Chapman v. Davis*, 8 Dowl. 831, C. P.

*Rule to plead once given is sufficient.]* Where the declaration and rule to plead were both in vacation, a judgment signed in the next term, without a new rule to plead, held regular. *Mould v. Murphy*, 2 Dowl. 54.

After a rule to plead in Easter term, in an action on a bill of exchange, defendant paid a portion of the bill, with the costs to that time, and agreed to pay the residue, with the costs of the action, the 1st of October following, if it were not previously paid by another party: no payment having been made according to the agreement:— Held, that plaintiff might sign judgment in Michaelmas term, without

a fresh rule to plead. *Osborne v. Pennell*, 1 Bing. N. C. 320; 1 Scott, 277.

*Pleading issuably.]* The common order to "plead issuably" applies to the plea only, and not to the rejoinder or subsequent pleadings. *Woodman v. Goble*, 3 Mee. & W. 304; 7 Law J., Ex. 59; 6 Dowl. 371; and *Betts v. Applegarth*, 4 Bing. 267.

It seems that an issuable plea is not merely a plea on which issue may be taken, but one that goes to the substantial merits of the action. *Staples v. Holdsworth*, 5 Scott, 432; 7 Law J., C. P. 66; 6 Dowl. 196.

In an action for goods sold and delivered, a plea that the plaintiff, before the commencement of the action, and after the debt was contracted, became a bankrupt, is an issuable plea. *Willis v. Hallett*, 7 Scott, 474; 8 Law J., C. P. 244.

The defendant, being under terms to plead issuably, pleaded to debt on bond, that the plaintiff had promised to forbear further proceedings on the performance of certain conditions by the defendant, which were performed. The plaintiff having signed judgment for want of a plea, a rule to set aside the judgment was discharged, with costs, on the ground that the plea was frivolous. *Blackburn v. Edwards*, 10 Ad. & E. 21; 8 Law J., Q. B. 200; 2 P. & D. 237.

The defendant being under terms of pleading issuably, pleaded to an action on a banker's draft, that the sole cause of his making the draft was for money won by one H. B., in a common gaming house, from the defendant by gaming. The court held that this was not an issuable plea, and refused to set aside the judgment that had been signed by the plaintiff as for want of a plea. *Humphreys v. Waldegrave (Earl)*, 6 Mee. & W. 622; 9 Law J., Ex. 244; 8 Dowl. 768.

If a defendant is under terms to plead issuably, and he pleads nonquam indebitatus to a declaration containing counts on bills of exchange, as well as for goods sold and delivered, the plaintiff may treat the plea as a nullity, and sign judgment as for want of a plea. *Sewell v. Dale*, 8 Dowl. 309.

A plea raising a fair question of doubt on a matter of law, the decision of which will determine the legal rights of the parties on the merits, is an issuable plea. *Zuluetta v. Miller*, 15 Law J., C. P. 267; 10 Jur. 859.

The defendant being under terms of pleading issuably, put in a special demurrer, and the plaintiff signed judgment as for want of a plea. The court held that the plaintiff was entitled to do so. *Sautell v. Gillard*, 5 Dowl. 620, K. B.

Where the defendant being under terms of pleading issuably, pleaded a plea clearly frivolous, and so late that the demurrer could not be argued in the term, the court set it aside, and gave leave to sign judgment, unless the defendant would undertake to go to trial at the first sittings, and pay the costs of amending and of the rule. *Brown v. Austin*, 4 Dowl. 161, Ex.

*Undertaking to plead issuably how waived.]* Where a defendant being under terms to plead issuably, the plaintiff, before the time for pleading is out, obtains an order for leave to amend the declaration by adding

a particular allegation, the defendant having liberty also to plead traversing that allegation, and the declaration is amended accordingly, the undertaking to plead issuably is thereby done away with. *Hutt v. Giles*, 11 Mee. & W. 756.

And if a plaintiff amend his declaration after a defendant has obtained time to plead on the usual terms of pleading issuably, &c., the latter is at liberty to demur specially to the declaration. *Children v. Mannerling*, 8 Dowl. 120, B. C.

*Non issuable plea how waived.]* Obtaining time to reply is a waiver of an objection that the plea is not an issuable one, the defendant being under terms to plead issuably. *Trott v. Smith*, 9 Mee. & W. 765; 2 Dowl. N. S. 278.

*Frivolous and non-issuable plea.]* Where after a frivolous and non-issuable plea, the plaintiff signed judgment as for want of a plea, a rule to set aside the judgment was discharged with costs. *Blackburn v. Edwards*, 10 Ad. & E. 21.

The court will set aside pleas which are frivolous or absurd, though the defendant be not under terms of pleading issuably. *Horner v. Keppel*, 10 Ad. & E. 17; 2 P. & D. 234; and *Miley v. Walls*, 1 Dowl. 648.

*A plea offering several defences must be pleaded by order.]* Where the defendant pleaded a plea offering several defences to the action, and raising several issues, both of fact and law, without leave to plead several matters, the court confirmed an order, made by a judge at chambers, for setting it aside, without an affidavit of its falsehood. *Balmanno v. Thompson*, 8 Dowl. 76; 6 Bing. N. S. 153.

*Pleading false pleas for delay.]* Where, by the plaintiff's own laches, on a plea of judgment recovered, no time remains to obtain a judgment of the term in the regular course, the court will not give leave to sign judgment as for want of a plea, on an affidavit that the plea is false, or, semble, that the defendant's attorney has admitted it was put in merely for delay. *Poole v. Salter*, 1 Law J., Ex. 65; 2 C. & J. 85; 1 Dowl. 297.

To debt on a judgment, the defendant pleaded a release of December, 1831, destroyed by accident. Upon affidavit that the plea was false, the court allowed the plaintiff to sign judgment as for want of a plea. *Smith v. Hardy*, 8 Bing. 435; 1 M. & Sc. 676; 1 Law J., C. P. 130.

Where a single plea is calculated to perplex, and renders it necessary for the plaintiff to consult counsel, the court, upon an affidavit that it is false, will allow judgment to be signed as for want of a plea. Thus, in an action on a bill of exchange by the indorsee against the acceptor, where the defendant pleaded "that the bill was obtained without consideration; that a blank piece of paper on a 2s. 6d. stamp was handed to him, with a request that he would put his name as acceptor; that he accepted the bill payable at a particular place only; and that these facts were known to the plaintiff," the court gave the plaintiff leave to sign judgment as for want of a plea, on an affidavit

that all the allegations in the plea were false. *Miley v. Walls*, 2 Law J., Ex. 170.

*Frivolous pleas.]* A judge at chambers as well as the court has authority to set aside frivolous and perplexing pleas, and to allow the plaintiff to sign judgment. *Balmauno and others v. Thompson*, 9 Law J., C. P. 57.

*Pleading issuably—obtaining order for particulars of set-off—waiver of objection.]* Where a defendant is under terms of pleading issuably, and one of the pleas is a set-off; obtaining an order for particulars of the set-off is a waiver of the objection that the pleas are not issuable. *Scott v. Watson*, 3 Dowl. & L. 208; 1 C. B. 826.

*The terms of pleading issuably are waived by a subsequent amendment of the declaration.]* A defendant being under terms of pleading issuably, the plaintiff, before plea, obtained an order to amend his declaration by inserting an averment, which the defendant was to be at liberty to traverse:—Held, that the defendant was released from the terms of pleading issuably. *Chapman v. Giles*, 1 Dowl. & L. 389, Ex.

*Pleading issuably in assumpsit on an attorney's bill.]* In an action by an attorney for work and labour, a plea that the plaintiff has not delivered a signed bill, a month before action brought, is an issuable plea, within the meaning of the terms to plead issuably. *Wilkinson v. Page*, 1 Dowl. & L. 913, C. P.

*Non-issuable pleas although pleaded by judge's order enables plaintiff to sign judgment.]* A defendant being under terms to plead issuably, applied for leave to plead several pleas, which were objected to by the plaintiffs as being non-issuable; notwithstanding which the judge made the order allowing the pleas. The pleas having been pleaded pursuant to the order, the plaintiff signed judgment as for want of a plea:—Held, that the plaintiff was right in signing judgment, the pleas being clearly non-issuable. *Capner and others v. Mincher and others*, 13 Mee. & W. 704; 2 Dowl. & L. 694.

*Pleading in libel general issue and special plea.]* In an action for libel in a newspaper, defendant will not be allowed to plead to the same cause of action, the general issue and a special plea of an apology and payment of money into court, under 6 & 7 Vic. c. 96. *O'Brien v. Clement*, 3 Dowl. & L. 676; 15 Law J., Ex. 244.

*Pleading several pleas.]* The general issue “by statute” cannot be pleaded with a special plea. *Legge v. Boyd*, 9 Dowl. 39; 2 Scott, N. S. 1; 1 M. & G. 898; and *Neal v. M'Kenzie*, 1 C. M. & R. 61.

The court, in the exercise of its discretion, under stat. 4 Anne, c. 16, s. 4, will not give leave to plead not guilty “by statute,” together with a special plea, although such plea raise a defence independent of the statute. *Ross v. Clifton*, 11 Ad. & E. 631; 9 Dowl. 1033.

A defendant may plead several pleas, showing different legal conclusions from the same facts. *Curry v. Arnott*, 5 Bing. N. S. 224; 7 Dowl. 249; 7 Scott, 172.

No rule to plead several matters is required, where the pleas are added under a judge's order. *Monck v. Shenstone*, 3 Scott, 661.

A plea of *nunquam indebitatus* as to all except a certain sum, and a tender of that sum, does not require a rule to plead several matters. *Archer v. Garrard*, 3 Mee. & W. 63; 6 Dowl. 132.

Where a plaintiff has consented to a rule to plead several matters, the court will not entertain an application to set aside any of these pleas. *Howen v. Curr*, 5 Dowl. 305, Ex.

A summons to plead several matters returnable on the day after the time for pleading expires :—Held to operate as a stay of proceedings at the hour when the judgment office opens, and as if a summons for further time to plead had been taken out, and judgment signed at the opening of the office therefore irregular. *Wells v. Secret*, 2 Dowl. 447, B. C.

A summons to plead several matters, taken out on the day the time for pleading expires, returnable on the following day at eleven o'clock :—Held, that, until disposed of, it operated as a stay of proceedings, although the time for pleading had been enlarged. *Spenceley v. Shouls*, 5 Dowl. 562, K. B.

A plea is not to be disallowed because it is bad in law : the question is, whether it contains a distinct subject-matter of defence. *Bulley v. Foulkes*, 9 Law J., Ex. 185.

The court have no discretionary power to allow several pleas, in a case where such pleas are prohibited by the new rules. The pleas of a custom unqualified, and a custom qualified, cannot be allowed. *Bastard v. Smith*, 5 Ad. & E. 25; 6 Law J., K. B. 8; 1 N. & P. 242.

*Several matters cannot be pleaded to information of intrusion.]* The court has no authority under 4 & 5 Anne, c. 16, s. 4, to allow a defendant to plead several matters in an information of intrusion by the attorney-general. *The Attorney-General v. Donaldson*, 10 Law J., Ex. 139.

*Order to plead several matters, after judgment signed for want of a plea.]* Pending a rule, to set aside judgment that had been signed for want of a plea, the defendant obtained the order of a judge to plead several matters ; but the court set aside the order. *Wilkes v. Ottley*, 2 N. & P. 99.

*Pleading several pleas by public registered officer.]* The court will not allow a defendant, who is sued as public registered officer of a joint-stock banking company, to plead a traverse of the allegation in the declaration, that he was such officer at the commencement of the action, where the company are the real defendants, and there are pleas which go to the merits of the action. *Needham v. Law*, 12 Law J., Ex. 316.

*A plea of general issue under any statute must be so marked in margin.]* The rule of T. T., 1 Vic., with respect to the insertion of the words "by statute" in the margin of a plea of the general issue, is not in contravention of the proviso in 3 & 4 Will. 4, c. 42, s. 1. And where a defendant pleads the general issue only, without inserting those words, he cannot at the trial be allowed to show, that he acted in the

execution of any act of parliament. *Bartholomew v. Carter*, 10 Law J., C. P. 257.

If a defendant plead not guilty "by statute" to the declaration, that plea also extends to a new assignment. *Mason v. Newland*, 9 Car. & P. 575.—Patteson, J.

*Pleading the general issue "by statute."*] The court will not allow the plea of the general issue "by statute," to be pleaded together with special pleas. *Thomsett v. Clifton and others*, 10 Law J., Q. B. 233.

*Plea by statute—statement of the particular statute.]* The defendant having pleaded a plea "by statute," the court on an affidavit, that the plaintiff was unable to discover the statute alluded to, compelled the defendant to name the statute, on pain of having the words "by statute" struck out of the margin of the plea. *Coy v. Lord Forester*, 8 Mee. & W. 312; 10 Law J., Ex. 262.

*To a plea amounting to the general issue, de injuriā cannot be replied.]* To debt for duties payable under the Ramsgate Harbour Act, the defendant pleaded a section of the statute, which exempted him from liability to pay the dues. The plaintiff replied *de injuriā* :—Held, that the replication was bad, as the plea amounted to the general issue.

Quære, whether *de injuriā* can be replied in an action of debt. *Pelly v. Rose*, 1 Dowl. & L. 601.

*Payment of money into court, and plea of payment.]* In an action on a security bearing interest, the defendant paid into court a sum equal to the debt and interest up to the time of the action brought, but not to that of paying in the money. The court held, that the plaintiff was entitled to proceed in the action, and recover damages for the remaining interest. *Kidd v. Walker*, 2 B. & Ad. 705.

A plea of payment of a less sum of money into court on a general indebitatus count or counts is good, though the amount, intended to be appropriated to each count, is not shown. *Jourdain v. Johnson*, 4 Dowl. 534; 5 Tyrw. 524.

Where there are several counts for several causes of action, or several breaches are assigned in covenant, the defendant may plead payment into court of one entire sum in full satisfaction of all the counts or breaches. *Marshall v. Whiteside*, 4 Dowl. 766; 1 Mee. & W. 188.

The court refused to allow a plea of payment, without paying in the money, on the ground of the sum indorsed having been paid in, in lieu of bail. *Ball v. Stafford*, 4 Dowl. 327; 2 Scott, 426.

The plea of payment of money into court cannot be pleaded to the same cause of action covered by other pleas. *Thompson v. Jackson*, 8 Dowl. 591; 1 Scott, N. S. 157; 1 M. & G. 242.

The plea of payment into court should conclude with the prayer of judgment, and be the last plea. *Sharman v. Stevenson*, 2 C. M. & R. 75; 3 Dowl. 709.

Where a defendant has several defences to different parts of the plaintiff's demand, and intends to plead payment into court as to other parts of the demand, he should first of all plead those pleas, and then

the plea of payment of money into court as to the residue only. *Coates v. Stevens*, 3 Dowl. 784; 2 C. M. & R. 118.

Payment into court admits the contract, if special; if not, only as to the sum paid in. *Seaton v. Benedict*, 5 Bing. 31; 2 M. & P. 67; and *Drake v. Lewin*, 4 Tyrw. 730.

Payment of money into court on a special count admits the contract stated in that count. If it be paid in on the general counts, it admits a liability to the extent of the sum paid in, and to that extent only. Where, therefore, in an action for work and labour, the defendant paid money into court to the amount of 10*l.*, and the defendant, if liable at all, was only so, on a contract entered into by a third person, the defendant by that, admitted that such third person was his authorised agent to make a contract to the amount of 10*l.*; but it was competent for him to show, that the authority given by him to such third person did not extend beyond that sum. The rule, which requires the bill of particulars to be annexed to the record does not make them part of the record, so as that payment of money into court, on a count for work and labour, would be an admission of something being done on the account mentioned in the particulars; and the defendant may, notwithstanding, show that he is liable only to the amount paid in upon a different account of the same description. *Meager v. Smith*, 1 N. & M. 449; 4 B. & Ad. 673; 2 Law J., K. B. 108.

*Payment into court—subsequent costs.]* The plaintiff is liable to the subsequent costs, if he does not recover beyond the sum paid in. *Jones v. Owen*, 2 C. & J. 476; 1 Dowl. 565.

The rule as to the plaintiff not recovering more than the sum paid into court, as to costs, does not apply to unliquidated damages. *Ackwood v. Read*, 5 Mee. & W. 542; 7 Dowl. 810.

After an offer to pay under an order, and refusal, but subsequently accepted, the plaintiff is only entitled to costs up to the time of the order. *Parsons v. Pitcher*, 4 Bing. 306; 6 Dowl. 432; and *Marryatt v. Clapp*, 1 Dowl. 701, Ex.

To fix a plaintiff with the costs incurred subsequently to a summons to stay proceedings, upon payment of a less sum than that demanded, which, having been refused, is, after further proceedings taken out of court, some ground of vexation and oppression must be clearly shown. *Haworth v. Holgate*, 2 Y. & J. 257; *Carr v. Smythers*, 3 B. & B. 168; and *Last v. Benton*, 2 Marsh 478; and contra *James v. Raggatt*, 2 B. & Ald. 776.

Where an action of ejectment is brought on certain breaches, and money is paid into court on one of them, and the plaintiff takes it out, and does not proceed to trial, the defendant is entitled to judgment as in case of a nonsuit. *Doe d. Stanley v. Towgood*, 2 Dowl. 494, B. C.

*Plea of payment into court should cover debt and damages.]* A plea of payment of money into court, in an action of debt, should answer both the debt and the damages for its detention, although, in the form of this plea given by the Reg. Gen. T.T., 1 Vic., no mention is made of damages when the plea is pleaded to this form of action. *Lowe v. Steel*, 15 Mee. & W. 380; 10 Jur. 787, Ex.

In an action of debt for work and labour, money paid, &c., the de-

fendant pleaded that he paid to the plaintiff a certain sum of money "in full satisfaction and discharge of all the causes of action in the declaration mentioned." The plaintiff having signed judgment on the ground that the plea did not notice the damages claimed in the declaration :—Held, that the judgment was rightly set aside by a judge at chambers. *Treston v. Barrington*, 10 Jur. 928.

*Plea of payment into court in assault and battery.]* To an action for assault and battery, the defendant pleaded payment into court of 25*l.*, pursuant to the rule of T. T. 1 Vic. c. 7. The plaintiff replied, damages ultra; on which issue was joined, and the defendant obtained a verdict :—Held, that the plaintiff was not entitled to judgment non obstante veredicto, because, although the plea of payment into court is prohibited in an ordinary action of assault and battery, by the 3 & 4 Will. 4, c. 42, s. 21, it did not appear upon the record that the defendant was not a person entitled, under some other statute, to pay money into court, by way of amends in such an action. *Aston v. Perkes and another*, 15 Mee. & W. 385.

*Payment into court in trespass, by judge's order, before declaration.]* In an action of trespass a judge may make an order, before declaration, for the defendant to be at liberty to pay money into court under 3 & 4 Will. 4, c. 42; and if the defendant pleads that, "before the plaintiff declared," he paid into court a sum of money by way of compensation, and avers that the plaintiff has not sustained damage to a greater, &c., on which the plaintiff takes issue, and that issue is found for the defendant, the court will not grant a rule for judgment non obstante veredicto. *Edwards v. Price*, 6 Dowl. 487, B. C.

*Payment into court in action on bond not pleadable.]* Payment of money into court, under the 4 & 5 Anne, c. 16, s. 13, in discharge of principal and interest on a bond, and costs, cannot be pleaded to an action on a bond. *England v. Watson*, 9 Mee. & W. 333.

*Payment into court as to one count and acceptance, no waiver of objection to other pleas as non-issuable.]* The declaration contained a count on a bill of exchange. The defendant paid money into court thereon, and pleaded to the residue of the declaration. The plaintiff having accepted the money out of court :—Held, on its being objected that such acceptance was a waiver of the objection to other pleas as non-issuable, that it was no such waiver. *Verbiest v. De Keyser*, 3 Dowl. & L. 392.

*Payment of money into court.]* An action for damages, occasioned by the negligently running down the plaintiff's boat by the defendant's vessel, is not an action for a debt or demand within the meaning of the 3 & 4 Will. 4, c. 42, s. 17. *Watson v. Abbott*, 2 C. & M. 150.

In an action against a sheriff for a false return and for an excessive levy, and for not paying over the residue, the court refused to allow the sheriff to pay money into court with costs. *Woodgate v. Bullock*, 2 Dowl. 256, Ex.

Where a whole count applies to a demand for unliquidated damages,

money cannot be paid into court on a part of it. *Hodges v. Lord Litchfield*, 2 Dowl. 741, C. P.

Money may be paid into court on one of several breaches of covenant, contained in a lease set forth in the declaration, if the plaintiff's particular specifies the sum he claims on that breach. *Smith v. King*, 2 Dowl. 751, C. P.

In an action, by a landlord against a tenant, for not repairing, the court refused to allow the defendant to pay money into court by way of compensation and amends, under the 3 & 4 Will. 4, c. 42, s. 21. *Serle v. Barrett*, 2 Ad. & E. 82; 4 N. & M. 200.

*Payment of money into court in trespass and assault.]* Trespass for breaking and entering plaintiff's house, and assaulting and beating his son:—Held, that the defendants might pay money into court under a judge's order, by virtue of 3 & 4 Will. 4, c. 42, s. 21. *Newton v. Holford and others*, 2 Dowl. & L. 554, Q. B.

*Money paid into court on plea, how taken out on the death of defendant.]* Money paid into court on a plea of payment, and the suit having abated by the defendant's death, can only be paid out of court to the representatives of the defendant, and not on the application of the attorney. *Palmer v. Reiffenstein*, 1 M. & G. 94.

*Plea of payment.]* Plea of payment, after the cause of action accrued, is sufficient without stating any day. *Beesley v. Dolley*, 6 Bing. N. S. 27; 8 Scott, 243.

If a plea of payment professes to answer the whole declaration, the plaintiff cannot sign judgment as to part not answered. *Wood v. Farr*, 5 Bing. N. S. 247; 7 Scott, 270.

A plea of payment after action brought need not mention the costs. *Corbett v. Swinborne*, 8 Ad. & E. 673.

The replication may traverse the payment as well as the receipt. *Webb v. Wheatherley*, 1 Bing. N. S. 502; 1 Scott, 477.

But strictly, need only deny the acceptance of the money. *Ridley v. Tindall*, 7 Ad. & E. 134.

On a plea of payment of all the monies:—The court held, that the plaintiff need not new assign, but was entitled to recover the balance between the amount of debt proved and payment made. *Freeman v. Crafts*, 4 Mee. & W. 1; 6 Dowl. 698.

Pleas of payment, or set-off, cannot be found distributively, unless the amount proved by the defendant equals the plaintiff's claim. *Kilmer v. Bailey*, 5 Mee. & W. 385; and *Tuck v. Tuck*, *Id.* 114.

On a plea of payment, if that be the only issue, the defendant is to begin. *Richardson v. Fell*, 4 Dowl. 10.

To entitle the defendant to a verdict, on a plea of payment, he must prove the exact sum stated in the plea. *Cousins v. Paddon*, 2 C. M. & R. 547; 5 Tyrw. 535.

*Plea of payment where credit is given in the particulars.]* Where payment is pleaded, after credit in the particulars, it applies to the balance. *Eastwick v. Harman*, 6 Mee. & W. 13; 8 Dowl. 399.

*Pleading a set-off.]* A judgment recovered, after action brought, and before plea pleaded, is a good set-off. *Reynolds v. Beering*, 4 Doug. 181.

It is no answer to a plea of set-off on a judgment recovered, that the plaintiff has brought a writ of error, to reverse the judgment, which is still pending. *Ib.*

If the defendant plead the general issue and another plea, he cannot give evidence of a set-off under a notice, but must plead the set-off. *Duncan v. Grant*, 1 C. M. & R. 383; 3 Law J., Ex. 341; 4 Tyrw. 818.

On a plea of set-off, the plaintiff need not, in the first instance, prove the whole of his demand, but after the defendant has proved his set-off, is at liberty to give evidence of the parts of his demand, to meet the set-off. *Williams v. Davies*, 1 C. & M. 164; 2 Tyrw. 383; 2 Law J., Ex. 202.

Where a plaintiff replies to a plea of set-off, "that he never was indebted in manner and form," he is not at liberty to give evidence of payment in answer to the defendant's proof of his set-off. *Stockbridge v. Sussams*, 11 Law J., Q. B. 217.

Where a plaintiff replies to a plea of set-off, that "he was not, nor is indebted to the defendant in manner and form," he is at liberty to give evidence of payment to support the replication. *Harvey v. Holtman*, 12 Law J., Q. B. 185; and *Jackson v. Robinson*, 8 Dowl. 622.

A plea of set-off is not divisible; the defendant by it alleges a demand, exceeding or equal to the plaintiff's claim, and if he do not prove that, fails on the whole of the plea. If he prove a part of his set-off, that may be taken in reduction of damages. *Moore v. Butlin*, 7 Law J., Q. B. 20; 7 Ad. & E. 595; 2 N. & P. 436.

Where there are several counts, for several causes of action, a plea of set-off, of a smaller sum is good; though it is pleaded generally to the whole declaration, and not applied to any particular count or sum. *Noel v. Davis*, 7 Law J., Ex. 287; 4 Mee. & W. 136; 7 Dowl. 48.

A plea of set-off, which stated, "that before and at the time of the commencement of the action, the plaintiff was indebted to the defendant," without adding "and still is indebted," was held bad on demurrer. *Dendy v. Powell*, 3 Mee. & W. 442; 7 Law J., Ex. 154; 6 Dowl. 577.

Where a defendant pleads a set-off, which plea, as he is not able to support by evidence, is found against him, and afterwards brings an action to recover the amount of such alleged set-off, the verdict of the jury in the former action, and judgment entered thereon, may be pleaded as a bar to the action, and by way of estoppel to the claim. *Eastmure v. Hawes*, 8 Law J., C. P. 236; 5 Bing. N. C. 444; 7 Scott, 461.

A plea of set-off, "that before and at the time of the commencement of the suit, the plaintiff was and still is indebted," &c., "for money due and owing from the plaintiff to the defendant on an account stated," is sufficient without any other averment of time. *Harsant v. Bush*, 11 Law J., Q. B. 264.

*Plea of set-off averring the promises to be by defendant and another and plaintiff indebted to them.]* A plea of set-off, in an action of assumpsit, averring that the promises, in the declaration mentioned,

were made by the defendant jointly with one L., who is still alive ; and that the plaintiff was and is indebted to the defendant and L., in a large sum ; out of which said sum so due and owing by the plaintiff to the defendant and the said L. as aforesaid, the defendant and the said L. offer to set-off :— Held, good on special demurrer. *Stackwood v. Dunn*, 12 Law J., Q. B. 3.

*Plea to the whole declaration and demurrer to one count.]* A defendant having obtained an order to plead several matters, pleaded a plea to the whole declaration, and delivered also a demurrer to one count, whereupon the plaintiff signed judgment as for want of a plea. The court refused to set aside the judgment, except on the terms of the defendant's striking out the demurrer, and paying the costs of his defective pleading. *Baily v. Baker*, 9 Mee. & W. 769.

*Inconsistent pleas allowed if amounting to a substantial defence.]* On a motion to strike out pleas as inconsistent :—Per Cur. The rule H. T. 4 Will. 4, distinctly says, that several pleas shall be allowed, if distinct grounds of answer or defence are intended to be established in respect of each ; and that is the case here. The word “inconsistent” was studiously kept out of the rules, for the subject was discussed, and it was felt that there might be cases in which pleas might be inconsistent with each other, and sustain substantially different defences. The object had in view was to prevent the same defence being pleaded in different forms. *Duerr v. Triebuer*, 3 Dowl. 133 ; 1 Bing. N. S. 266 ; and *Wilkinson v. Small*, 3 Dowl. 564, B. C.

*Pleas allowed by judge's order cannot be struck out.]* The court has no power under the Reg. Gen. H. T. 4 Will. 4, s. 6, to strike out pleas that have been allowed by a judge. The proper course is, to move to rescind the judge's order. *Turquand and another v. Hawtrey and another*, 11 Law J., Ex. 294.

*Counsel's signature to pleas.]* A plea of plene administravit need not in the Exchequer or the Queen's Bench be signed. *Reed v. Spurr*, 5 Dowl. 330 ; 2 Mee. & W. 76.

Nor a plea of nul tiel record in the Common Pleas. *Hubert v. Lord Weymouth*, 2 H. Bl. 816.

A plea of the statute of limitations, although not concluding with a verification, must be signed by counsel. *Roberts v. Howard*, 9 Mee. & W. 838 ; 1 Dowl. N. S. 667.

A plea of the statute of limitations requires to be signed ; but although a nullity if unsigned, judgment cannot be signed until the time for pleading has expired. *Macher v. Billing*, 1 C. M. & R. 577 ; 4 Law J., Ex. 16 ; 4 Tyrw. 812.

*All special pleas and subsequent proceedings which conclude with a verification must in the King's Bench be signed by a barrister, except the pleas of plene administravit, comperuit ad diem, nul tiel record, and son assault demesne, or liberum tenementum, and in the Common Pleas, except comperuit ad diem, solvit ad diem, and nul tiel record ; but it is now a rule that “ all pleadings which conclude to the country need not be signed by counsel.” Rule H. T. 2 Will. 4.*

*And by Rule H. T. 4 Will. 4, "To a joinder in demurrer no signature of counsel shall be necessary."*

*A plea improperly concluding to the country requires counsel's signature.]* To a declaration, containing a count on a bill of exchange, and a count on an account stated, the defendant pleaded to the first count a plea introducing new matter, but concluding to the country, instead of with a verification; and to the second count, a plea of the general issue; the pleas were not signed by counsel:—Held, first, that the plaintiff was at liberty to sign judgment upon the whole record; for that the Reg. Gen. H. T. 2 Will. 4, s. 107, in providing that no pleading which concludes to the country need be signed by counsel, means which *properly* concludes to the country; secondly, that the plaintiff was not bound to take the objection by demurrer; and thirdly, that the two pleas formed but one whole, and that the judgment on the whole record was therefore correct. *Stevens v. Angell*, 1 Dowl. & L. 150, Q. B.

*Pleas delivered without counsel's signature a nullity, and judgment may be signed.]* Where a defendant pleaded the general issue to the whole declaration, and to part thereof a special plea, concluding with a verification, and delivered them without counsel's signature:—Held, that the plaintiff might treat the whole pleading as a nullity, and sign judgment as for want of a plea. *Shield v. Quick*, 10 Law J., Ex. 270; 8 Mee. & W. 289.

*Counsel's signature on the draft pleas not the copy delivered.]* The plaintiff signed judgment for want of a plea. The question was, whether the copy of the signature of counsel, placed on the draft, was a sufficient signature, according to the practice of the court. The draft had been signed by the counsel himself, and copied on the plea delivered:—Held, that counsel need not sign the plea delivered. *Salter v. Pomford*, 8 Dowl. 435, Q. B.

*Upon consulting the judges of the Exchequer, it appeared to the judges to be a convenient rule to lay down, that it is sufficient for the counsel to sign the draft.*

*Counsel's name in issue delivered.]* The name of the counsel signing the pleas need not be inserted in the issue delivered. *Jefferies v. Yablonski*, 10 Jur. 438, C. P.

*Pleading after amendment of declaration.]* On the amendment of the declaration after plea, the defendant has no right to plead de novo, unless it forms part of the judge's order. *Collins v. Aaron*, 5 Scott, 595, C. P.

The defendant having pleaded, an amendment of the declaration was ordered with liberty to plead de novo. The court held, that, if the defendant did not plead de novo, the former pleas should stand, if applicable to the amended declaration. *Fagg v. Borsley*, 1 C. & M. 770; 2 Dowl. 107; 3 Tyrw. 905.

Where the plaintiff obtains an order to amend his declaration, to which the defendant has demurred, and the latter at the same time

obtains an order for time to plead, that time must be calculated from the time that the plaintiff amends, and not from the date of the order for time, although the latter order does not refer to the former. *Davies v. Stanley*, 8 Dowl. 433, B. C.

If a plaintiff takes out a summons to amend the declaration, the defendant has a right to presume it will be followed up by a peremptory summons, and therefore it will operate as a stay of proceedings for one day; consequently, where the time for pleading was out on the day on which the peremptory summons could have been made returnable, a judgment signed for want of a plea on the next day was held irregular. *Hodgson v. Caley*, 8 Dowl. 318, B. C.

*Pleading to an amended declaration after demurrer.]* Where, after demurrer, the plaintiff amends his declaration and pays costs, the demurrer is at an end, and the defendant has two days' time to plead de novo to the amended declaration; but where a declaration is amended after plea, the defendant cannot in this court, plead de novo, without an order for that purpose. *Smith v. Hearne*, 1 Dowl. & L. 992, Ex.; 12 Mee. & W. 715.

*A plea dated before delivery is not a nullity.]* The time for pleading expired on the 1st November. On the morning of the 2nd, before the opening of the office, the defendant's attorney delivered a plea dated the 1st. Upon this, the plaintiff signed judgment:—Per Cur. All writs are required to bear date on the day when they issued, but if they are tested on a different day they are treated as irregular only, and not as void. Here the plea is right on the face of it, and the wrong date is in the nature of a mistake. *Hodson v. Pamel*, 4 Mee. & W. 373; 7 Dowl. 208.

A plea having been demurred to, because it was dated 1832, instead of 1833, the court ordered the demurrer to be set aside with costs. *Neal v. Richardson*, 2 Dowl. 89, Ex.

*A misnomer in a plea does not make it a nullity.]* On a motion to set aside a judgment:—The court held, that a misnomer as to the defendant's Christian name, in his plea, is not a ground for treating it as a nullity, and that the plaintiff had no right to sign judgment as for want of a plea. *Anon.* 7 Dowl. 511.

*Conclusion of pleas.]* A plea must still conclude with a verification, or to the country, notwithstanding the rules H. T. 4 Will 4. *Snow v. Stevens*, 1 C. M. & R. 26; 2 Dowl. 664.

Pleas need not conclude with a verification unless they contain affirmative matter; therefore, a plea of the statute of limitations, without a verification, is good on special demurrer. *Bodenham v. Hill*, 7 Mee. & W. 274; 8 Dowl. 862.

An informal conclusion of a plea is no ground for arresting the judgment, or for a repleader, if there has been an issue to try; the objection can only be taken advantage of on special demurrer. *Smith v. Smith*, 5 Dowl. 84, Ex.

A plea of ne unques executor may conclude to the country. *Wood v. Kerry*, 3 Dowl. & L. 642; 15 Law J., C. P. 122.

*Dates of the pleadings in the issue.]* The issue must state the dates of the pleadings but need not the form of action. *Ball v. Hamlet*, 1 C. M. & R. 575; 3 Dowl. 188.

The rule as to the date of the pleadings does not apply to a mere added similiter. *Shackel v. Ranger*, 3 Mee. & W. 409.

An issue may be amended, if the teste and return of the writ be left in blank. *Watts v. Ball*, 8 Dowl. 589; 1 Scott, N. S. 173.

The omission to transcribe into the issue delivered, the dates of the pleadings, constitutes a variance, of which the defendant is entitled to avail himself after trial, and the roll is made up, although the dates appear in the roll. *Worthington v. Wigley*, 5 Dowl. 209, C. P.

In the issue, the date of the writ of summons was wrongly stated; the word defendant was used instead of defendants, and the award of venire was to the then sheriff:—Held, that these errors were no ground for setting aside the issue, but that the proper course was to apply to a judge at chambers to amend it, at the plaintiff's costs. *Ikin v. Plevin*, 5 Dowl. 594, Ex.

*Conclusion of issue.]* Where the issue contained an “&c.” after the replication, and no similiter was added, but it was properly added on the Nisi Prius record:—Held, that there was sufficient to justify the presumption of a perfect record, or that the party would make a perfect one, and a rule for arresting the judgment was discharged. *Brook v. Finch*, 6 Dowl. 313.

Where a replication traversed the facts contained in the plea, and concluded to the country, but without an “&c.” and no similiter was added:—Held, that the omission might be considered as a misprision of the clerk and amendable after verdict, judgment, and writ of error brought. *Siboni v. Kirkman*, 3 Mee. & W. 46; 6 Dowl. 98.

*Plea set aside on an affidavit of its falsehood.]* The defendant, to an action against him as maker of a promissory note, pleaded want of consideration, and an agreement, that if, at the end of a month from the date of the note, he should not be able to pay it, he should not be compelled to do so, but should be at liberty to renew it; and then averred, that he was unable to pay it, but was ready and willing to renew it. The court set aside this plea on an affidavit of its falsehood, which was not contradicted by the defendant. *Mitford v. Finden*, 10 Law J., Ex. 473; 8 Mee. & W. 511.

*Pleading an insufficient plea.]* The mere fact of a plea being clearly insufficient in point of law, is not a ground for signing judgment as for want of a plea. *Cowper v. Jones*, 4 Dowl. 591.

*Demand of plea before signing judgment.]* Where a plea is a nullity, the plaintiff must nevertheless demand a plea before he signs judgment, and cannot treat it as a waiver of such demand. *Hough v. Bond*, 1 Mee. & W. 314.

Where the plaintiff has entered an appearance under the statute he may sign judgment, without demanding a plea. *Willet v. Wilson*, 2 C. & J. 356.

The delivery of a plea after nine o'clock in the evening, does not entitle the plaintiff to sign judgment for want of a plea, without

returning the plea, or giving notice of the objection to the time of delivery. *Horsley v. Purdon*, 3 Law J., Ex. 65; 2 Dowl. 228.

*Date of similiter to pleadings.]* A common similiter, whether delivered to a party on his own behalf, or added for him by the other, is not a pleading within the rule of H. T. 4 Will. 4, and does not require a date. *Edden v. Ward*, 9 Law J., Q. B. 323; 8 Dowl. 725.

Semblé, that where a party adds the similiter, forming part of his own pleadings, it is a pleading within rule H. T. 4 Will. 4, s. 1, and must bear a date, or it may be set aside for irregularity. Such irregularity is not waived by the party to whom the issue so made up is delivered, omitting to take that objection, on attending a summons to show cause why the action should not be tried before the sheriff. *Midleton v. Woods*, 6 Mee. & W. 136; 8 Dowl. 170.

*Similiter added at the trial.]* When a record is taken down to trial without any issue having been joined by omission to add the similiter, the defect may be cured by adding it at the trial. If the jury have been sworn before the defect is found out, they should be re-sworn after the similiter has been added. *Dyson v. Warris*, 1 M. & R. 474.

*Similiter added after trial, where it was omitted by mistake.]* The record may be amended by adding a similiter to a replication, where the error can be presumed to be the misprision of the clerk, even after verdict, judgment, and a writ of error brought upon the judgment, assigning as one cause of error, the want of a similiter. *Siboni v. Kirkman*, 3 Mee. & W. 46; 7 Law J., Ex. 3; 6 Dowl. 98.

*Plea of judgment recovered, what is.]* To an action of assumpsit for money lent, the defendant pleaded, that in an action in which the now defendant was plaintiff, and the now plaintiff was defendant, the now plaintiff set off the same debt for which the present action was brought, and in that action the now defendant obtained a verdict:—Held, that this was not a plea of judgment recovered, within the meaning of the rule of H. T. 4 Will. 4, r. 8, and that the plaintiff could not sign judgment as for want of a plea. *Brokenshir v. Monger*, 9 Mee. & W. 111.

*Pleading autre action pendent.]* To an action of assumpsit for work done, a plea that another action is pending for the same cause against a third party is a bad plea. *Henry v. Goldney*, 15 Law J., Ex. 298; 10 Jur. 439.

The plaintiff issued two writs, one out of the Court of Common Pleas, which was never served, the other out of the Exchequer, on which he proceeded to declare. The defendant pleaded to the action in the Exchequer, another action pending for the same cause in the Court of Common Pleas. The plaintiff replied nul tiel record, and served the defendant with a rule to produce. The defendant made up a roll from the praecipe on the file of the Court of Common Pleas:—The court ordered it to be cancelled with costs. *Kirby v. Siggers*, 4 M. & Sc. 481; 2 Dowl. 659.

*Where payment is pleaded particulars with dates not granted.]* There is no such analogy between a plea of set-off and of payment, as will

lead the court to require the defendant, who has pleaded payment, to give particulars of the sums paid, and the dates when they were paid. Nor will the court compel such particulars to be furnished, merely on an affidavit by the plaintiff that he cannot safely proceed to trial unless they are delivered. *Phipps and another v. Lothian*, 9 Law J., Ex. 88.

*Time to reply—replying issuably.]* It is neither usual nor reasonable, on granting a plaintiff time to reply, to impose on him the terms of replying issuably. *Crutchley v. London and Birmingham Railway*, 2 Dowl. & L. 102, Q. B.

*Replication de injuriā to action in debt.]* The replication de injuriā is applicable to debt as well as assumpsit. To debt by payee against the maker of a promissory note, the defendant pleaded that he was induced to make, and did make the note, by means of the fraud, covin, and misrepresentation of the plaintiff:—Held, that de injuriā was a good replication. *Cooper v. Garbett*, 1 Dowl. & L. 969, Ex.

*Amendment of replication.]* After replying damages ultra, to a plea of payment, the plaintiff may amend and accept the money in satisfaction, on payment of costs. *Kelly v. Flint*, 5 Dowl. 293, Ex.

*Replication concluding with an “&c.” no similiter.]* It is no objection to a verdict that no similiter has been added, if there is an “&c.” at the end of the replication. *Handford v. Handford*, 6 Dowl. 473.

*Replication to a plea of set-off.]* To a plea of set-off for 400*l.*, alleging in the usual form that such sum exceeded the damages sustained by the plaintiff; the latter replied, as to 234*l.* parcel, &c., the statute of limitations, and as to the residue of the 400*l.* that he was not indebted modo et formā, concluding with a prayer of judgment:—Semble, that the replication was bad; also that, in strictness, a plea of set-off should allege that the defendant's claim equals, not exceeds, that of the plaintiff. *Fairthorne v. Donald*, 2 Dowl. & L. 675, Ex.

*Rejoining gratis.]* The term, “rejoining gratis,” means rejoining without a rule for that purpose; and, therefore, where a defendant is under those terms, he has still four days from the delivery of the replication in which to rejoin; the only effect of that term being to dispense with the necessity of a rule to rejoin. *Adkins v. Anderson*, 10 Mee. & W. 12; 1 Dowl. N. S. 877.

A twenty-four hours' demand of a rejoinder, however, is still necessary where the rule H. T. 2 Will. 4, does not apply; and being under terms to rejoin gratis does not dispense with the demand. *Steaton v. Skeay*, 3 Dowl. 537, B. C.

*A plaintiff having time to reply cannot afterward object that a plea is not issuable.]* Defendant being under terms to plead issuably, delivered with his pleas a rule to reply, and the plaintiff obtained a week's time to reply; at the end of which, instead of replying, he signed judgment, on the ground that one of the pleas was not issuable:—Held, that the plaintiff had waived the objection to the plea by obtaining time to reply. *Stead v. Carey*, 2 Dowl. & L. 270, C. P.

*Where the defendant refuses to rejoin plaintiff may sign judgment.]* When the plaintiff delivers the issue, adding the similiter for the defendant, and the defendant gives notice that he has struck out the similiter, but does not deliver any rejoinder or demurrer within the four days limited for that purpose; the proper course for the plaintiff to pursue is to sign judgment for want of a rejoinder. *Twycross v. King*, 2 Dowl. & L., 534 Q. B.

*Rule for striking out pleas, form of.]* A rule for striking out pleas was drawn up without reading the declaration, or its being made an exhibit. The court discharged it. *South Eastern Railway Company v. Short*, 9 Law J., Q. B. 28; 3 P. & D. 110.

*Abandonment of plea demurred to.]* A declaration in debt by a joint-stock company, dated the 29th March, stated that A. B., the secretary for the time being of a certain company, called, &c., complains of C. D., &c., who have been summoned to answer the said plaintiff, as such secretary as aforesaid, by virtue of a writ issued on the 2nd day of March, &c. Plea, amongst others, a release by the said company of the said several causes of action, and special demurrer thereto. Rejoinder, that inasmuch as the defendants cannot deny that the said last plea is insufficient in law, they freely here in court relinquish the same, and abandon all verification thereof; therefore, let no regard whatever be had to the said plea. Issues having been joined on the other pleas, and the plaintiff having recovered a verdict, the defendants brought a writ of error, on the ground, first, that it did not appear that the plaintiff was secretary at the time of action brought; secondly, that the defendants were not at liberty to abandon their plea:—Held, on motion by the plaintiff to quash the writ of error as frivolous, or to issue execution notwithstanding the writ; first, that it sufficiently appeared that the plaintiff was secretary at the commencement of the suit; secondly, that the writ of error was not frivolous.

Quære, whether the defendants were at liberty to abandon the plea demurred to. *M'Intyre v. Miller and others*, 14 Law J., Ex. 180.

*A special plea demurred to cannot be referred to on the trial.]* Where a special plea has been demurred to, the defendant's counsel has no right at the trial to allude to the statement in it in his address to the jury. *Ingram v. Lawson*, 9 C. & P. 326.—Maule, J.

*Time for making application to amend pleadings.]* An application to amend the pleadings does not fall within the rule, which requires parties complaining of an irregularity to apply to the court promptly. *Welsh v. Hall*, 11 Law J., Ex. 57; 9 Mee. & W. 14.

*Repleader.]* The rule that a repleader is never awarded in favour of the party who made the first fault, applies only where the issue is found against that party. *Gordon v. Ellis*, 7 M. & G. 607.

*Repleader awarded on motion for judgment non obstante veredicto.]* In debt on award, the plea, not confessing the action, raised an immaterial issue, which the jury found for the defendant. The court held,

that the proper course was to award a repleader, and not give judgment non obstante veredicto. So, where there are several pleas and issues taken, but the action is confessed in none, if one be immaterial the court may award a repleader. *Plummer v. Lee*, 5 Dowl. 755; 2 Mee. & W. 495.

Neither party is entitled to costs on a repleader. *Ib.*

*Signing judgment for want of a plea.]* Where a declaration was delivered on the 9th, indorsed to plead in four days, and plea demanded on the same day, and judgment signed for want of a plea at one o'clock on the 14th:—Held, irregular. *Blundell v. Hansom*, 2 Mee. & W. 243; 5 Dowl. 457, over-ruling *Kemp v. Fyson*, 3 Dowl. 265, see infra.

Where a declaration was filed on the 24th December, with notice to plead in four days, and judgment was signed on the 29th:—Held, irregular. *Wheeler v. Green*, 7 Dowl. 194, Ex.

Where a declaration was delivered on the 4th of August, with notice to plead in four days:—Held, that judgment could not be signed for want of a plea until the afternoon of the 9th. *Kemp v. Fyson*, 3 Dowl. 265, Ex.

An order for seven days' time to plead was obtained on May 15th. On the 22nd, pleas were delivered, but irregular in several respects, and on the evening of that day the plaintiff signed judgment as for want of a plea: the court set aside the judgment as having been signed too early. *Pepperell v. Burrell*, 1 C. M. & R. 372; 2 Dowl. 674.

Where the declaration was delivered on the 7th, to plead in four days, and on the 10th an order for particulars was obtained, which were delivered on the 13th:—Held, that judgment for want of a plea signed at ten o'clock on the 15th was regular. *Tate v. Bodfield*, 3 Dowl. 218, Ex.

Where a plea was in fact delivered before judgment signed, and the plaintiff's attorney afterwards, with knowledge of that having been done, signed judgment:—The court held the judgment irregular, and set it aside with costs to be paid by the attorney. *Ampthill v. Semple*, 2 C. & J. 358; 2 Tyrw. 312.

Where the judgment was signed in term for want of a plea, where the plea was delivered before eleven o'clock of the day after that on which the time for pleading expired:—Held, irregular. *Leigh v. Bender*, 4 Dowl. 201, Ex.

A plaintiff has no right to sign judgment for want of a plea before the time for pleading is out, although a bad plea may have been delivered. *Dakins v. Wagner*, 3 Dowl. 535, B. C.; *Nolleken v. Severn*, 2 C. & J. 333; *Smith v. Rathbone*, 5 Dowl. 401.

Where after obtaining a week's further time to plead, the defendant took out several summonses for further time, the last returnable on the day after the week's time expired, but no order taken on either:—Held, that the plaintiff was entitled to sign judgment on that day. *Bass v. Cooper*, 2 Mee. & W. 310.

To a declaration on a bill of exchange, and on an account stated, the defendant pleaded non assumpsit, whereupon the plaintiff signed judgment as for want of a plea:—Held, that he was not justified in signing judgment, the proper course being to demur; and the court refused to amend such judgment by confining it to the issue raised

on the first count of the declaration. *Eddison v. Pigram*, 16 Law J., Ex. 33.

The defendant pleaded non assumpsit in debt. The court held, that being a nullity it was not waived by the plaintiff afterwards calling for the particulars of a notice of set-off, which formed no part of the record; and the court refused to set aside the judgment signed for want of a plea, upon a mere affidavit of merits. *Ford v. Barnard*, 6 Bing. 535.

Where the defendant pleads nil debet as to part, and a tender as to the residue of the plaintiff's demand, but omits to pay the money tendered into court, the plaintiff cannot sign judgment on the entire demand for want of a plea, but only for the residue. *Chapman v. Hicks*, 2 C. & M. 633; 3 Law J., Ex. 219.

### PLEADING—*Puis darrein continuance.*

*Plea of puis darrein continuance.]* A plea of puis darrein continuance held to be independent of a judge's order to rejoin issuably. *Bryant v. Perry*, 5 Bing. 414; 2 M. & P. 760.

If one of two defendants plead a plea of bankruptcy puis darrein continuance, the plaintiff cannot, at Nisi Prius, confess this plea to be true, and go on with the case as to the other defendant. *Pascall v. Horsley*, 3 C. & P. 372.

If a plea pleaded puis darrein continuance, good in form, be verified by affidavit, and there be also an affidavit under the rule H. T., 4 Will. 4, s. 2, the judge at Nisi Prius will receive it, although there may be reasons to believe that it is pleaded for delay. *Ludlow Corporation v. Tyler*, 7 C. & P. 537.

On demurrer to a plea puis darrein continuance, there must be a joinder before the cause can be tried. *Thompson v. Pennal*, 2 B. & Ad. 968.

*Plea of puis darrein continuance after jury sworn.]* A witness for the plaintiff's having been objected to as incompetent, on the ground of his being a co-contractor with the defendants, a release was tendered to him, whereupon the defendants pleaded the release puis darrein continuance, as a discharge of the debt. The witness, at a subsequent period, cancelled the release by tearing off the seal, and the plaintiff's then replied non est factum, to which the defendants rejoined that the deed "is the deed of the plaintiff's." The defendants having been unable, at a subsequent trial, to produce the deed, or to give secondary evidence of its contents, owing to a mistake as to the party in whose possession it was, and the jury having accordingly found for the plaintiff's, the court granted a new trial, on the ground of surprise, although it was objected by the plaintiff's, that the jury, being sworn to try the issue according to its terms, would be bound to find it for the plaintiff's, since there was no valid deed in existence at the time of issue joined. *Todd and another v. Emley and another*, 12 Law J., Ex. 142.

*Delivery of plea of puis darrein continuance.]* A plea of puis darrein continuance cannot be delivered between the parties, after the

sittings at Nisi Prius have commenced, but must be put in at the trial.

Semblé, if the matter pleaded arose more than eight days before the trial, the judge will exercise his power to allow the plea. *Page v. Shenstone*, 10 Jur. 1009, B. C.—Patteson, J.; S. C. *Payne v. Shenston*, 16 Law J., Q. B. 61.

On the 14th January, the 13th having been Sunday, the defendant pleaded *puis darrein continuance*, a judgment recovered on the 5th January :—Semblé, that the plea was delivered in time, Rule 8 of H. T. 2 Will. 4, having operated, under those circumstances, to extend the eight days to nine, on account of the 13th falling on a Sunday. *Dudden v. Triquet*, 4 Mee. & W. 676.

*[After plea of puis darrein continuance plaintiff may discontinue.]* Where a defendant pleads a plea, *puis darrein continuance*, he cannot compel the plaintiff to proceed with the suit, but the latter is at liberty to discontinue without costs. *Wollen v. Smith*, 8 Law J., Q. B. 122.

*Motion to set aside plea of puis darrein continuance.]* The court will not set aside a plea of a release by one of several co-plaintiffs, unless it is clearly shown to have been made in fraud of the other plaintiffs, or unless the releasor be a mere nominal party to the action, having no interest whatever in the subject-matter of it. *Rawsthorne and others v. Gandell and another*, 15 Mee. & W. 304.

*Plea puis darrein continuance—costs if defendant succeed.]* Where the defendant pleads *puis darrein continuance*, and he succeeds in the action, he is not entitled to any costs incurred previous to the plea. *Lyttleton v. Cross*, 4 B. & C. 117.

#### PLEADING—*Plea in abatement.*

*Plea in abatement, sufficient description of place of residence.]* The word “residence” in the 3 & 4 Will. 4, c. 42, s. 8, which requires that pleas in abatement for the non joinder of persons who ought to have been made defendants, shall be accompanied by an affidavit stating the place of residence of such persons with convenient certainty, means the home or domicile of the parties. And therefore, where such an affidavit stated a party to be resident at a certain place which was really his home, but he was not actually there, having gone abroad for a short time :—Held, that the statute was complied with. *Lambe v. Smythe*, 10 Jur. 394, Ex.; 15 Law J., Ex. 287; 3 Dowl. & L. 712; 15 Mee. & W. 433.

*Plea in abatement—particulars of residences of persons named.]* If the affidavit, verifying a plea in abatement professes to give the particulars of the residences of the persons named therein, and in fact misdescribes them, the defendant is bound by such description, and the plea will be set aside, although the misdescription occurred merely by mistake, or was such that the proper residence could have been easily ascertained. *Newton and others v. Stewart*, 15 Law J., Q. B. 384.

*Plea in abatement, if a nullity.]* If a plea in abatement be a nullity, no act of the plaintiff, apparently acquiescing in it, will be construed into a recognition of it. *Garratt v. Hooper*, 1 Dowl. 28.

*Plea in abatement, for non-joinder.]* A plea in abatement, for the non-joinder of a co-contractor, which prays judgment of the declaration, and that the same may be quashed, is informal; it ought to pray judgment of the writ and declaration. *Davies v. Thompson*, 14 Mee. & W. 161; 3 Dowl. & L. 49.

*Coverture not a plea within the statute 3 & 4 Will. 4, c. 42, s. 8.]* A plea in abatement of covverture of the defendant is not within the statute 3 & 4 Will. 4, c. 42, s. 8. *Jones v. Smith*, 3 Mee. & W. 526; 7 Law J., Ex. 143; 6 Dowl. 557.

*A plea in abatement of covverture—an affidavit necessary.]* A plea in abatement, to an action of debt, of the defendant's covverture, is a dilatory plea requiring an affidavit of verification under the stat. 4 Anne, c. 16, s. 11: and if there be no such affidavit, the plaintiff is entitled to sign judgment as for want of a plea, although part of the cause of action accrued after the covverture. *Lovell v. Walker*, 9 Mee. & W. 299.

*Coverture of plaintiff, how pleadable.]* The covverture of the plaintiff cannot be pleaded in bar to an action of covenant on a deed made between the defendant and the plaintiff; it is matter for a plea in abatement only. *Bendix v. Wakeman*, 12 Mee. & W. 97.

*Pendency of another action cannot be pleaded in abatement.]* In an action against one of several joint contractors, the defendant cannot plead in abatement, the pendency of another action for the same cause against another of the joint contractors, and in which he was not himself a defendant. *Henry v. Goldney*, 10 Jur. 439; 15 Law J., Ex. 298.

*Time for delivery of plea in abatement.]* The four days within which the pleas must be delivered are calculated exclusively of the first and inclusively of the last day. *Ryland v. Wormald*, 2 Mee. & W. 393; 5 Dowl. 581.

Under special circumstances the time has been extended. *Sowter v. Dunston*, 1 Mee. & W. 508.

*Affidavit of verification of plea in abatement.]* An affidavit of verification, when it refers to the declaration, cannot be sworn before the latter is delivered. *Bower v. Kemp*, 1 C. & J. 287; 1 Dowl. 281; *Westerdale v. Kemp*, 1 Tyrw. 263.

The stat. 4 & 5 Anne, c. 16, s. 16, provides, that an affidavit verifying the truth of the plea, shall be annexed to all pleas in abatement. The act only applies where the matter of the plea is dehors the record. *Grey v. Gedneff*, 3 B. & B. 395.

If the affidavit cannot be obtained in time to deliver with the plea, application should be made to a judge for an extension of time. *Johnson v. Popplewell*, 2 C. & J. 544.

The affidavit may be made by the defendant, or any other person cognizant of the facts alleged. *Long v. Comber*, 4 East, 348.

The affidavit must strictly agree with the plea in describing the parties. *Poole v. Pembrey*, 1 Dowl. 693.

An affidavit verifying a plea of coverture need not state the residence of the husband to be within the jurisdiction, as such plea is not within 3 & 4 Will. 4, c. 42, s. 8. *Jones v. Smith*, 3 Mee. & W. 526; 6 Dowl. 557.

*Plea in abatement as to part, and in bar as to residue.]* The defendant may plead in abatement as to part, and in bar, to the residue: a new assignment in such cases is unnecessary. *Hill v. White*, 8 Dowl. 13; 9 Law J., C. P. 3; 6 Bing. N. C. 23.

*Plea in abatement by one of several defendants.]* A plea in abatement, applicable only to one defendant, praying judgment of the writ generally, and that it may be quashed, is bad. *Wade v. Stiff*, 1 M. & P. 26.

*Costs on plea in abatement.]* On setting aside a plea in abatement for irregularity, no costs are allowed. *Poole v. Pembrey*, 1 Dowl. 693.

An amendment after a plea in abatement may be with or without payment of costs, at the discretion of the court. *Wall v. Lyon*, 1 Dowl. 714; 9 Bing. 411.

*Plea of privilege by an attorney.]* A plea of privilege by an attorney, is a plea in abatement requiring an affidavit. *Davidson v. Chilman*, 1 Bing. N. S. 297; 1 Scott, 177.

A plea of privilege as an attorney need not aver that he is not an attorney of the court in which he is sued. *Percival v. Cooke*, 5 Mee. & W. 293.

*Nisi Prius record after plea in abatement and judgment.]* It is not requisite to set out in the issue and *Nisi Prius* record a previous plea in abatement, and judgment of respondeat ouster therein. *Pepper v. Whalley*, 5 N. & M. 437.

*Plea of release.]* To set aside a plea of release by parties not joined, fraud must be established. *Herbert v. Pigott*, 2 C. & M. 384; 2 Dowl. 392.

A release, obtained fraudulently from one of several plaintiffs will, when pleaded, be set aside. *Barker v. Richardson*, 1 Y. & J. 362.

Where one of several plaintiffs, assignees of a bank, releases the cause of action, and the release is pleaded, the court will set aside the plea, suspicion being thrown on the defendant's conduct in the transaction, the co-plaintiffs indemnifying the plaintiff, who had given the release, against costs. *Johnson v. Holdsworth*, 4 Dowl. 63, B. C.

Where the affidavits in support of an application to set aside a release, given by a co-plaintiff, do not clearly show fraud, the court will not interfere summarily to set it aside. *Crook v. Stephens*, 5 Bing. N. S. 688; 7 Scott, 848.

The court will not set aside a plea of release given by one of several

plaintiffs, unless a clear case of fraud is made out between the releasor and the defendant: fraud upon the releasor is not a ground for setting aside the plea, since that may be replied. *Wild v. Williams*, 6 Mee. & W. 490.

## PRISONER.

*Service of notice on plaintiff, by a prisoner for his discharge.]* Service upon one of several plaintiffs of the defendant's intention to apply for his discharge under 48 Geo. 3, c. 123, s. 1, is sufficient for a rule absolute in the first instance. *Harris v. Turtle*, 8 Mee. & W. 258.

*To discharge a prisoner, irregularly arrested on attachment.]* A prisoner, who has been arrested irregularly on an attachment must apply for his discharge without delay. *Regina v. Burgess*, 3 N. & P. 366.

*Discharge of a bankrupt on production of his certificate.]* Where a judge at chambers, upon an application made to him under sec. 42 of the stat. 5 & 6 Vict. 122, has refused to discharge a bankrupt from custody on his producing his certificate, this court has no jurisdiction to entertain a similar application. *Wearing v. Smith*, 10 Jur. 924, Q. B.

*Proceedings against a defendant arrested on capias.]* The proceedings by capias in pursuance of a judge's order, under 1 & 2 Vic. c. 110, are collateral to the cause; and, therefore, although defendant is arrested, and continues in custody, plaintiff may enter an appearance for him, file his declaration, and serve notice thereof, in the same manner as if no arrest had taken place. *Neal v. Snoulton*, 3 Dowl. & L. 442; 2 C. B. 322.

*A prisoner may move for his discharge under 48 Geo. 3, c. 123, although he has applied to the Insolvent Court.]* A prisoner in custody for twelve calendar months for a debt under 20*l.* is entitled to his discharge under 48 Geo. 3, c. 123, notwithstanding his having applied for relief, under the 1 & 2 Vic. c. 110, to the Insolvent Court, and the commissioner having adjudged that he should not be entitled to the benefit of that act for three years; as the operation of such an order is, not to secure the imprisonment of the applicant for that length of time, at all events, but only to prevent his obtaining for so long the benefit of the Insolvent Act. *Hopkiss v. Pledger*, 1 Dowl. & L. 119, Q. B.

*A prisoner may renew an application for his discharge.]* A prisoner has a right to apply de die in diem for his discharge, and is not prejudiced by a former application having been unsuccessfully made. *Hallett and others v. Cresswell*, 15 Law J., Q. B. 129, B. C.—Williams, J.

*Discharge of prisoner under 48 Geo. 3, c. 123,—verification of signature to notice.]* In moving to discharge a defendant out of custody, under 48 Geo. 3, c. 123, it is necessary to have an affidavit, verifying

the signature to the notice served on the plaintiff, of his intention to apply to the court. *Randall v. Sweet and another*, 10 Law J., C. P. 132.

*Application for discharge of prisoner after a remand by Insolvent Court.]* A prisoner remanded by the Insolvent Debtors Court is not thereby incapacitated from applying to this court to be discharged, under the 48 Geo. 3, c. 123, s. 1.

It must appear distinctly by the affidavit on which such discharge is moved, that the original debt does not exceed 20*l.* Therefore, where the affidavit stated that the plaintiff had recovered judgment in an action brought to recover the sum of 17*l.* 4*s.*, and the writ which was appended to the affidavit was indorsed to levy 23*l.* 8*s.* 4*d.*; the court would not presume that the surplus sum of 6*l.* 4*s.* 4*d.* was solely for costs. *Clapperton and Wife v. Monteith*, 1 Dowl. & L. 908, C. P.

*To discharge a married woman, sole defendant in a suit commenced before her marriage.]* An action was brought against the defendant, a widow, in March, 1845; in April she married, and in May, judgment in that action was signed against her, and a ca. sa. issued, under which she was taken in execution:—Held, that she was not entitled to be discharged out of custody, although she had no separate property. *Beynon v. Margaret Jones*, 15 Law J., Ex. 303; 3 Dowl. & L. 667.

*To discharge a married woman, a party to a suit from custody.]* On an application to discharge a defendant out of custody, on the ground that she is a married woman, the court will require the strictest negative proof from her that she has no separate property; where it appears from the affidavits on the other side, that there are reasons for doubting such to be the fact. *Ferguson v. Clayworth and Wife*, 2 Dowl. & L. 165, Q. B.; 6 Q. B. 269.

*Prisoner on attachment, habeas corpus to discharge.]* The court will not grant a habeas corpus to bring up the body of a party to enable him to move the court, in person, to set aside two writs of attachment, on which he is in custody. *Ford v. Nassau*, 11 Law J., Ex. 287.

*A prisoner brought up by habeas corpus—motion for his discharge.]* It is not necessary to wait till the rising of the court to move the discharge of a prisoner out of custody, on a return to a habeas corpus, where no notice of any opposition to the motion has been given. The court will order him to be discharged forthwith. *In re Howard*, 2 Dowl. & L. 536, Q. B.

*Discharge of prisoner brought up on habeas corpus to be charged in execution.]* Where a prisoner is brought up under a habeas corpus ad satisfaciendum, he is entitled to be discharged on payment of the debt and costs in the action, and cannot be detained until payment of the court fees on the writ. *Dalzell v. Cullen*, 12 Mee. & W. 1; 1 Dowl. & L. 448.

*Charging a prisoner in execution.]* A prisoner, in custody under process of contempt of the Court of Common Pleas is liable to be

charged in execution upon a judgment in this court in the ordinary way. *Wade v. Wood*, 1 C. B. 462.

*Service of notice by a prisoner for his discharge, where plaintiff is dead.]* The plaintiff in a suit being dead, the court allowed notice of application for the defendant's discharge under the 48 Geo. 3, c. 123, to be served on his son, who was the attorney in the action, and who refused to say who was his father's personal representative. *Booth v. Steer*, 1 Dowl. & L. 374, Ex.

*Prisoner in execution on a judgment in ejectment may apply under 48 Geo. 3, c. 123 for his discharge.]* A judgment in ejectment is a judgment for damages, within the statute 48 Geo. 3, c. 123. s. 1, and a prisoner who has lain in prison for twelve calendar months in execution on such judgment for less than 20s. is entitled to his discharge. *Doe d. Symous v. Rice*, 14 Law J., Q. B. 137.

*A defendant in execution on an old judgment, without a sci. fa., discharged.]* A party in execution, issued above a year and a day, on a judgment without a sci. fa.:—Held, entitled to take the objection, and not to have waived the right by delay. *Mortimer v. Peggett*, 4 Ad. & E. 363, note.

*Irregular ca. sa.—effect of subsequent detainers.]* A party arrested upon a ca. sa., afterwards set aside for irregularity, cannot be discharged out of custody, if before the setting aside the irregular ca. sa. detainers have been lodged against him by other parties, not connected with the person who sued out the original writ. *Wright v. Stanford*, 11 Law J., Q. B. 42; *Watson v. Carroll*, 9 Dowl. 217, Ex.; *Robinson v. Yewens*, 5 Mee. & W. 149; 7 Dowl. 377.

*A detainer against a prisoner valid, although the original arrest irregular.]* Where a prisoner has been arrested on a Sunday, a subsequent detainer by another party, without collusion, is not vitiated by the illegality of the original arrest. *In re James Ramsden*, 15 Law J., Q. B. 264.

The Common Pleas decided, there can be no detainer under another writ upon an illegal arrest. *Barratt v. Price*, 1 Dowl. 725; 9 Bing. 566; 2 M. & Sc. 634.

*An arrest on an irregular ca. sa. does not invalidate other writs.]* On a motion to discharge the defendant out of custody, it appeared that the defendant was taken on a ca. sa. under a judgment above a year old, and not revived by sci. fa.:—The court held, that, although entitled to his discharge, as to the arrest on that suit, it did not extend to invalidate other writs against him in the hands of the sheriff, and that the detention thereon was legal; besides, he was liable to be taken in execution on a valid ca. sa. *Reynolds v. Newton*, 1 Gale & D. 153; *Plomer v. Ball*, 5 Ad. & E. 823; and *Collins v. Beaumont*, 2 P. & D. 363.

*Motion under a writ of habeas corpus ad subjiciendum.]* A prisoner who sues out a writ of habeas corpus ad subjiciendum, is not bound by the decision of any one court: but is entitled to take the opinion of

all, as to the propriety of his imprisonment. *Ex parte v. Partington*, 2 Dowl. & L. 650, Ex.

*A prisoner in Queen's Bench under criminal process cannot be charged with civil process in the Common Pleas.]* Where the party is in the custody of the Queen's Bench under criminal process, a writ of habeas corpus ad satis. does not lie in order to charge him with civil process in the Common Pleas, even since 5 & 6 Vic. c. 22. *Gibb v. King*, 2 Dowl. & L. 806; 9 M. G. & Sc. 1.

## PROCHEIN AMY.

*Signature to petition of an infant plaintiff, for order to sue by next friend.]* The petition of an infant plaintiff to be allowed to sue by her prochein amy, may be signed by such prochein amy on her behalf, the infant being too young to sign it herself. *Eades v. Booth*, 15 Law J., Q. B. 263; 10 Jur. 311.

*The authority of a father to sue as prochein amy cannot be questioned.]* In an action by a father as prochein amy, for criminal conversation with his son's wife, the plaintiff having recovered, with leave reserved for the defendant to move to enter a nonsuit, and the defendant having applied for a certificate to deprive the plaintiff of costs, and no motion having been made to the court for a nonsuit:—Held, on motion to set aside the proceedings for want of authority, first, that as the defendant had reason to believe, before the trial, that the action was brought without the authority of the son, he ought to have made inquiries then; and that the application was too late; secondly, that no authority from the son was necessary to enable the father to sue, and that the son was bound by the action. *Morgan v. Thorn*, 10 Law J., Ex. 125.

*Prochein amy, appointment of.]* The father of the infant ought always, in the first instance, to be appointed prochein amy; and if his evidence is likely to be useful at the trial, an application should be made to the court to release him, by the appointment of a proper substitute.

An uncertificated bankrupt is an improper person to be appointed prochein amy; and if such an appointment be procured it will be revoked as an imposition practised on the court.

The appointment of prochein amy is in the discretion of the court; but quære, whether poverty is, alone, a sufficient reason for removing a prochein amy or requiring security for costs. *Watson v. Fraser*, 10 Law J., Ex. 420.

*Prochein amy—security for costs.]* The court will not call on the prochein amy of an infant plaintiff to give security for costs, on the ground that the attorney has refused to disclose the residence of the prochein amy, it not being sworn that he is in insolvent circumstances. *Haynes v. Carr*, 11 Law J., C. P. 111.

*Prochein amy, notice of action by.]* The prochein amy of a minor, who brings an action in his name, is his agent under 3 & 4 Will. 4, c. 52, s. 103, for the purpose of giving notice of the action. *De Gondouin v. Lewis*, 10 Ad. & E. 117; 2 P. & D. 283; 9 Law J., Q. B. 148.

## RECOGNIZANCE.

*Resisting or discharging recognizance.]* Recognizances will only be suspended from term to term, though the party prosecuting be alleged to be in America. *Thomas Clark, in re*, 11 Price, 730.

The Court of Exchequer has jurisdiction to respite process issued in respect of fines, &c., imposed upon presentments, &c., when estreated, but will only do so from term to term, and not further. *Inhabitants of Norwich, in re*, 11 Price, 766; and *Bennett, ex parte*, 11 Price, 770.

A recognizance will not be discharged without notice to the attorney-general, although the forfeiture accrued to the city of London. *Morris, ex parte*, 1 Mee. & W. 510.

A motion to discharge a defendant from estreated recognizances under 4 Geo. 3, c. 10, must be preceded by a notice to the solicitor of the Treasury. *Tipton, ex parte*, 3 Dowl. 177, Ex.

In order to obtain a discharge of a recognizance, there must be shown a constat of the proceedings from the clerk of the estreats office. *Dunk, ex parte*, 2 Tyrw. 500.

The Exchequer has no authority to interfere where the recognizance has not been estreated. *Rex v. Hankins*, 1 M'Clel. & Y. 27.

*Recognizance estreated into the Exchequer—motion for discharge of the party.]* A party taken in execution on a recognizance estreated into the Exchequer, and who denies its existence, must, in order to be relieved, come in and traverse the recognizance. *Ex parte Stowell*, 13 Law J., Ex. 328.

*Scire facias on recognizance.]* A scire facias upon a recognizance for payment of costs, occasioned by a claim to goods seized in case they should be adjudged forfeited. The court held it to be immaterial for whose benefit the recognizance was entered into; and it was for the defendant to show the condition to have been performed. *Rex v. Bullock*, 1 Mee. & W. 726; 1 Tyrw. & G. 998.

*Recognizance to prosecute an application, for a new trial in Common Pleas at Lancaster.]* On application under the statute 4 & 5 Will. 4, c. 62, s. 27, to a superior court in Westminster Hall, for a new trial in a cause in the Common Pleas at Lancaster, the recognizance, "to make and prosecute such application," is satisfied by obtaining a rule nisi, whatever afterwards becomes of the rule. *Haworth v. Ormerod*, 6 Ad. & E., N. S. 300; 13 Law J., Q. B. 265.

*Recognizance on certiorari estreated—costs on.]* Where a recognizance, taken before a justice of the peace upon the removal of an indictment into the Queen's Bench, had been returned and filed, but not enrolled, the court permitted it to be estreated into the Exchequer.

Upon a motion to estreat the recognizance, the affidavit stated that the side-bar rule, with the allocatur for costs thereon, had been served on the principal and bail, and the costs demanded, but it did not state that any notice of taxation had been given:—Held, that in the absence of any affidavit that such notice had not been given the court would assume the proceedings to be regular. *The Queen v. Sydserff*, 14 Law J., Q. B. 44.

## RECORD.

*Re-sealing record on the trial being postponed.]* Where a cause was set down in the list of undefended causes for trial in the third sittings in term, and on the defendant's statement that it was a defended cause was postponed till the sittings after term, and the plaintiff did not re-seal the record previous to those sittings, although he did so before the day on which the cause actually came on for trial, the court set aside the verdict which he obtained, for irregularity. *King v. Tress*, 2 Dowl. & L. 734, Q. B.

*Record—discrepancy in the date of the writ and the offence charged.]* The record in an action for slander stated, that the writ issued on the 4th of June, and that the words were spoken on the 27th:—Held, that this discrepancy on the record was no ground for arresting the judgment. *Steward v. Layton*, 3 Dowl. 430, Ex.

*Removal of a cause into the Exchequer—the crown interested.]* Where in trespass by subject against subject (in Common Pleas) the defendant alleging a seisin in the crown of the locus, and justifying under its command:—Held, that the crown having the right to interpose where its interests were concerned, the attorney-general was entitled to a rule absolute, in the first instance, to remove the cause into the office of Pleas of the Exchequer, putting the plaintiff in the same stage of forwardness in the suit as he was in the former court. *Attorney-general v. Hallett*, 15 Mee. & W. 97.

RULES—*Service of.*

*Service of rules.]* Service of a rule on an attorney by leaving it with a laundress at his chambers, who stated that she was authorised to receive notices and papers for him, is insufficient. *Dodd v. Drummond*, 1 Dowl. 381.

So is service on the laundress' servant. *Smith v. Spicer*, 2 Dowl. 231.

*Service of rule at the house of defendant's attorney on a servant.]* Where a rule nisi had been served by leaving a copy of the rule at the house of the defendant's attorney with a female servant, who stated she was authorised to receive papers for the attorney:—Held, sufficient service of the rule, and the court made the rule absolute. *Lancaster v. Castle*, 8 Jur. 848, B. C.—Wightman, J.

Service on a manservant of the defendant's attorney at his office:—Held, insufficient. *Kealey v. Cartwright*, 11 Jur. 378.

*Service of a rule at the late residence of defendant on his son.]* A rule nisi to compute was served on the defendant's son at the late residence of the defendant; afterwards, one R. admitted to deponent that he, R. received the rule from the son and gave the same to the defendant. The court held the service insufficient, but allowed the rule to be enlarged and served again at the late residence on the son and to be stuck up in the office. *Short v. Arnal*, MS. Exch. M. T. 1845.

*Service of rule on the sister of defendant's wife insufficient.]* A rule nisi to compute was served on the sister of the defendant's wife at the defendant's residence. The court held the service insufficient—that the affidavit ought to state that the person served was either a member of, or residing with, the defendant's family. *Holland v. Wright*, MS. Exch. E. T. 1845.

*Service on a female friend staying at defendant's house.]* Service of a rule to compute on a female, whom the deponent believed to be a friend staying at the defendant's house, and authorised to receive messages:—Held, insufficient. *Brandon v. Edwards*, 2 Dowl. N. S. 225.

*Service of rule at defendant's residence on a person who promised to deliver same to defendant.]* An affidavit of service of a rule, stated that the deponent served “the above-named defendant with a true copy of the rule, by delivering and leaving with one H. at the defendant's residence, situate, &c., a true copy of the said rule, and at the same time showing the original thereof, and that the said H. promised to deliver the said copy to the defendant:”—Held, to be insufficient, as it did not show a service on any person connected with the defendant's residence. *Taylor v. Whitworth*, 9 Mee. & W. 478; 1 Dowl. N. S. 600.

*Service of rule on defendant's clerk.]* The defendant's clerks said they had received service of a rule nisi, and would send it to their master, but they would not give any information as to where the master might be found:—Held, sufficient service. *Smith v. Jones*, 6 Jur. 1090, C. P.

*Service of a rule at the defendant's residence.]* Service on the mother of the defendant at his residence:—Held, sufficient. *Warren v. Smith*, 2 Dowl. 216, Ex.

Or on a female in the habit of receiving messages for the defendant at his dwelling house. *Edwards v. Napier*, 9 Dowl. 177, Q. B.

Or on a female who is sworn to be part of the defendant's family, and who promises to give the copy rule to the defendant. *Weeden v. Lipman*, 9 Dowl. 111, B. C.

Service on the defendant's landlady is not sufficient. *Gardner v. Green*, 3 Dowl. 343, B. C.

*Service of a rule to compute.]* Service of a rule to compute upon a clerk at the defendant's counting house:—Held insufficient. *Warwick v. Bacon*, 8 Scott, N. S. 667; 2 Dowl. & L. 596.

And on defendant's warehousman, at his warehouse in the city, insufficient. *Ibotson v. Phelps*, 9 Law J., Ex. 232; 6 Mee. & W. 626.

Service of a rule to compute upon a servant at a counting house is insufficient. *Rowland v. Vizetelly and others*, 1 Dowl. & L. 767, C.P.

A rule nisi to compute, served at York on the day cause was to be shown, is insufficient to authorize making the rule absolute, although ten days have elapsed since the service. *Farrell v. Dale*, 2 Dowl. 15, Ex.

Where the rule and copy had been sent by the post, and the original was a few days afterwards received back, indorsed with a receipt of

“copy of the within rule,” and signed:—Held, sufficient for making the rule absolute. *Smith v. Campbell*, 6 Dowl. 728.

*Service of rule to compute on one of several defendants sufficient.]* Service of a rule to compute principal and interest on a bill of exchange or promissory note, upon one of several defendants, is sufficient, as service upon one is service upon all. *Amlot v. Evans*, 7 Mee. & W. 462; and *Figgins v. Ward*, 3 Law J., Ex. 135; 2 C. & M. 424.

*Service of a rule by sticking it up in the office.]* Service of a rule by sticking it up in the office will not be allowed upon an affidavit that the attorney’s residence is unknown, unless it is also sworn that the party’s residence is unknown. *Wright v. Gardner*, 3 Dowl. 657, Ex.

But service of a rule to compute allowed, by sticking up in the office, and serving on the general attorney of the defendant, where the party was abroad, had no place of residence in this country and no attorney in the suit. *Gibson v. Lord Ranelagh*, 7 Scott, 231.

Where a regular service of a rule is endeavoured to be dispensed with on the ground of absence, or otherwise, the affidavit must show what efforts have been made to serve the party before secondary service will be allowed. *Mudie v. Newman*, 2 Dowl. 639, Ex.

Where, on account of the defendant’s residence being unknown, the court gives leave to serve him in a particular manner, they will not make a prospective rule, that service of future rules, &c. may be effected in the same manner. *Martin v. Colvill*, 2 Dowl. 694.

Leave to stick up a notice in the office must be limited to the particular proceeding. *Davis v. Jenner*, 2 Scott, N. R. 202; 9 Dowl. 45.

*Rule left instead of served sufficient.]* The affidavit of service stated that the rule nisi was “left” instead of stating that it was “served:”—Held, to be sufficient service. *Bailey v. Anderson*, MS. Exch. E. T. 1845; and *Short v. Smith*, 8 Dowl. 584.

*Description of rule in affidavit of service.]* An affidavit of service must swear to the service of the “rule annexed,” and not merely to the “rule in this cause.” *Fidlett v. Bolton*, 4 Dowl. 282.

*Description of the party served with a rule.]* An affidavit stating that service of a rule had been made upon Mr. S., “who acts as the attorney or agent of the defendant in this cause,” was held sufficient. *Patrick v. Rickards*, 15 Law J., Q. B. 204.

*Delay in the service of a rule—whether guilty of laches.]* It is not sufficient to make a party guilty of laches that he has delayed for an unnecessary time to serve a rule, unless it be shown that the other party is prejudiced by the delay. *Gurney v. Gurney and another*, 15 Law J., Q. B. 265; 3 Dowl. & L. 734.

*Service of rule on an attorney for the payment of money.]* Where it is clearly shown that an attorney keeps out of the way to avoid being served with rules for the payment of money, the court will allow service upon his clerk to be good service. The affidavit, however, must specify the endeavours to effect a service, and the reasons for believing that he is in town, and avoiding service. *Hinton v. Dean*, 4 Dowl. 352.

*Service of rule for payment of money—date must be clearly stated.]* An affidavit of service of a rule for payment of money, alleging a service “on the day of the date hereof” no date being stated, except by reference to the date of the jurat, is insufficient. *Hughes v. Browne*, 6 Man. & G. 751; 13 Law J., C. P. 73; 1 Dowl. & L. 788.

*Irregular service of a rule, how waived.]* Appearing to a rule is a waiver of service. *Levi v. Duncombe*, 1 C. M. & R. 737; 3 Dowl. 447.

If a party against whom a rule is granted obtains its enlargement, he cannot afterwards object that it was not personally served. *Cartwright v. Blackworth*, 1 Dowl. 489.

*Rule granted on payment of costs—effect of non-compliance.]* Where the plaintiff obtained a rule for a new trial on payment of costs, which were taxed and demanded, but not being paid within a reasonable time, a rule to show cause why the former rule should not be discharged was obtained unless paid on or before a stated day, which was done, the court discharged the second rule on the terms of the plaintiff paying the costs of the application. *Solly v. Langford*, 13 Mee. & W. 151; 2 Dowl. & L. 250.

*A rule nisi need not state the irregularity on which it was granted to set aside proceedings.]* It is not necessary, in a rule nisi to set aside proceedings for irregularity, to specify the grounds of irregularity on which the party relies. *Reunie v. Bruce*, 2 Dowl. & L. 946; 9 Jur. 597, B. C.—Coleridge, J.

Therefore, where it appears on the face of a writ of summons that it is directed to a defendant in a wrong county, and that on the capias the direction is left in blank, without stating sheriff or place, it is not necessary in a rule calling on the plaintiff to show cause why the defendant should not be discharged out of custody, to state the irregularity complained of; it is sufficient if it appears on affidavit. *Ib.*

*A rule nisi obtained under a mistaken supposition that an affidavit had been sworn.]* Upon a statement of counsel that he had moved for a rule to set aside an award, under a mistaken supposition that an affidavit deposing to certain facts had been sworn: the court on the day after granting the rule nisi gave leave for the rule to be drawn up as upon reading such affidavit, on condition that it should be sworn on that same evening. *Perring v. Kymer*, 4 Nev. & M. 477; 1 Har. & W. 20.

*A rule nisi obtained on a defective affidavit cannot be amended.]* Where a party obtained a rule nisi upon affidavits, which were badly entitled, and discovering his mistake he applied to the court for leave to take the affidavits off the file, and amend and re-swear them; the court refused to allow such a course to be taken, on the ground that the affidavits would appear to have been sworn after the rule was drawn up; and also refused to allow a fresh rule to be drawn up on amended affidavits; but suggested a new motion upon affidavits disclosing the circumstance of the error; giving no opinion however upon the validity or effect of such new motion. *Doe d. Hill v. Tollett*, 1 Dowl. & L. 121.

*Effect of rule with stay of proceedings.]* Where a defendant

obtains a rule which stays the plaintiff's proceedings, he is entitled to the whole of the day on which such rule is disposed of for taking the next step. *Vernon v. Hodgins*, 1 Mee. & W. 151; 4 Dowl. 665; 1 T. & G. 427.

*Insufficiency of affidavits in support of a rule.]* On showing cause against a rule, when an objection is taken to the insufficiency of the affidavits in support of the rule, the counsel showing cause must at once elect whether he will use his affidavits in answer to the rule or not. *Preedy v. Lovell*, 4 Dowl. 671.

*When a rule to show cause should be served.]* Where a rule to show cause on the 20th of November had not been served on the defendant till that day at Birmingham, the court, on the 25th (the last day of term), refused to make it absolute, but enlarged it till the next term. *Hawkins v. Benton*, 14 Law J., Q. B. 9.

*Affidavits to show cause against a rule, when may be sworn.]* Affidavits to show cause may be sworn after the rule is due, if no time be fixed by the rule for filing them. *Graham v. Beaumont*, 3 Scott, 287; 5 Dowl. 49; *Braine v. Hunt*, 2 Dowl. 391; and *Hicks v. Marreco*, 3 Tyrw. 216.

*Rule for attorney to answer matters of an affidavit.]* When it is sought to make a rule absolute against an attorney, requiring him to answer the matters of an affidavit, and he does not appear, he must be called in court. *In re Whicker*, 5 Dowl. 715.

*A rule may be abandoned.]* If a party obtaining a rule does not choose to proceed on it, the other party cannot compel him. *Doe d. Harcourt v. Roe*, 4 Taun. 883.

*Description of documents mentioned in rules.]* In drawing up a rule, it is not necessary to specify the particular document on which it is obtained, but it may be described as a paper writing, provided it be properly verified by affidavit. *Platt v. Hall*, 2 Mee. & W. 391; 5 Dowl. 583.

A rule for striking out counts was drawn up without reading the declaration or any affidavit. The court discharged it. *Roy v. Bristow*, 2 Mee. & W. 241; 5 Dowl. 452; 6 Law J., Ex. 79.

*Rule to produce documents under a commission.]* The stat. 6 & 7 Vic. c. 82, s. 5, extends to a commission for the production of documents from the courts of Scotland, but the rule to order the attendance of the parties, &c. is only nisi in the first instance. *Kay v. Gennell*, 2 Dowl. & L. 21.

*Rule of reference to the master—report thereon.]* In general, the court will not discuss the correctness of the master's report in a matter referred to him by the court. *Rex v. Morley*, 4 Ad. & E. 849.

*The terms of a rule binding on the party taking it.]* Where counsel obtained a rule nisi to enter a verdict for defendant, or for a new trial,

and defendant's attorney subsequently went to the rule office and had the rule altered, by striking out that part of it which related to a new trial, the court refused to make the rule absolute for a new trial. *James v. Hall*, 10 Jur. 569, B. C.—Williams, J.

*Rule to compute on a covenant.]* Upon an interlocutory judgment for the plaintiff in an action on a covenant to pay to the plaintiff all such sums as should be received by the defendant, a sequestrator, and be at his disposition from time to time, in part or in full satisfaction of a certain debt due to the plaintiff, the court refused to make a rule nisi to compute absolute. *Smith v. Nesbitt*, 2 M. G. & Sc. 286; 15 Law J., C. P. 31; 3 Dowl. & L. 420.

*Rule to compute—production of note—variance in maker's name.]* After judgment by default against the maker of a promissory note, and reference to the master to compute principal and interest upon it, it is not necessary to produce the note before the master. Where it was produced it appeared to be signed E. B., whereas the maker's name was E. T. B.:—Held, that the variance was immaterial. *Davis v. Parker*, 16 Law J., C. P. 86.

*A rule to show cause peremptorily.]* Where a rule is drawn up to show cause peremptorily on a day named, it may be made absolute as soon as the court has gone through the bar on that day. This is, for such purpose, to be considered to be the rising of the court. *Lace v. Adamson*, 12 Mee. & W. 807, 8 Jur. 409, Ex.

*Rule, irregularity in, not waived by appearing to show cause against it.]* Where the copy of a rule served upon a plaintiff is entitled in no cause, his appearance by counsel to take this objection does not operate as a waiver of the irregularity; but the rule will be discharged with costs. *Wood v. Critchfield*, 2 Law J., Ex. 2; 1 C. & M. 71.

Appearing to oppose a rule does not waive an objection to the affidavit on which the rule was obtained. *Barham v. Lee*, 4 Mo. & Sc. 327.

*Mistake in drawing up a rule, how corrected.]* Where the defect in a rule is attributable to the officer of the court, it will be amended without costs. *Downing v. Jennings and another*, 5 Dowl. 373.

On showing cause against a rule for the payment of money pursuant to an award, rule, and allocatur, it was objected that the rule recited "a rule made in these causes," whereas that rule was made in one cause only. It appearing that this was an error of the officer, the court directed the rule to be amended instanter without costs, upon the authority of the above case, *Downing v. Jennings*, and the argument then proceeded. *Benn v. Stockdale and another*, and *Stockdale and another v. Benn*, MS. Exch. E. T. 1846.

Where an error in the recording of proceedings arises from the misprision of an officer of the court, the court will allow an amendment, and will not permit the party to suffer in consequence of the mistake. *Lloyd v. Nicholas*, 4 Bing. N. C. 633; 6 Scott, 355; 7 Law J., C. P. 259.

*A rule drawn up in one term must be enlarged so as to be made abso-*

*lute in another.]* If a rule is drawn up to show cause in one term, it cannot be absolute in the next term without enlarging, but it may be revived. *Smith v. Collins*, 3 Dowl. 100.

*Several causes in the same rule.]* A rule making the same order in several causes may be moved for on a single affidavit entitled in all the causes. *Barrack v. Newton*, 1 Ad. & E., N. S. 525.

*Appealing against a rule or order.]* Where it is sought to impeach a rule of court or a judge's order, the materials upon which the rule or order was obtained should be brought before the court. *Needham v. Bristow*, 4 Scott, N. R. 773; 4 Man. & G. 662.

*Rule to set aside a demurrer.]* The rule to set aside a demurrer as frivolous must be drawn up on reading the plea, as well as subsequent proceedings. *Hamer v. Anderton*, 9 Dowl. 119, B. C.; and *Howorth v. Habbersby*, 3 Dowl. 455, Ex.

*Rule for a trial at bar.]* A rule was drawn up appointing a trial at bar for the 7th February, and the cause not being concluded on that day, the court held, the following morning, that their jurisdiction under the said rule had ceased, as only one day was named in the rule, and that consequently the cause stood adjourned to the first day of the following Easter term, on which day the jury being in attendance, the cause was called on, and the court ordered the trial to be resumed on Wednesday, the 23rd April, in that term. *Attorney General v. Geo. Smith*, MS. Exch. E. T. 1845.

*Showing cause in the first instance on a rule.]* It is not a matter of right to show cause against a rule in the first instance, although notice may have been given. *Doe v. Smith*, 3 N. & P. 335.

Where a party shows cause successfully in the first instance, he is not entitled to costs. *Fitch v. Green*, 2 Dowl. 439; and *Clark v. Lord*, 3 Law J., Ex. 20.

*Costs on successfully showing cause in the first instance against a rule.]* A party who shows cause successfully in the first instance against a rule, which, if granted, would be a stay of proceedings, and operate to his prejudice, will be allowed the costs of opposing the rule. *Rennie v. Berresford*, 10 Jur. 76, Ex.; 15 Law J., Ex. 78; 3 Dowl. & L. 464.

*Rule discharged on a technical objection—costs.]* Where a rule is discharged on a technical objection taken to an affidavit without going into the merits, no costs are allowed. *Preedy v. Lovell*. 4 Dowl. 671.

*To make an order of reference a rule of court.]* An order of reference of a cause at Nisi Prius, may be made a rule of court, although it does not contain the usual clause empowering the parties to that effect. *Harrison v. Smith*, 1 Dowl. & L. 876, Q. B.

*Rule discharged, costs on.]* The rule of 1796, concerning costs on rules discharged without any direction as to costs, is strictly confined

to applications on the ground of irregularity, either mentioned in the rule or in the affidavits. In all other cases where rules are moved with costs, and discharged generally without saying anything about costs, the successful party will not be entitled to them. A special direction must be given by the court in order to enable him to obtain them. *Drinker v. Pascoe*, 4 Dowl. 566.

Where a rule is discharged on a preliminary objection to the title of the affidavit supporting the rule obtained for setting aside proceedings on the ground of irregularity, the court has discretion as to the costs of the application. *Harris v. Matthews*, 4 Dowl. 608, B. C.

## SHERIFF.

*Sheriff, writs of trial directed to—before whom tried.]* An under-sheriff cannot appoint a deputy to try causes sent down by a writ of trial to the sheriff. *Jones v. Williams*, 12 Law J., Q. B. 295.

*Rule by defendant for sheriff to return writ.]* The defendant may rule the sheriff to return the writ, if it become necessary for him to do so; as, for instance, where upon arrest he deposits a sum of money in lieu of a bail bond, and he afterwards wishes it to be paid into court. *France v. Clarkson*, 2 Dowl. 532.

Some special grounds for the application must be shown, or the court will not assent to an application on the part of the defendant against a sheriff to return a writ of ca. sa. *Williams v Webb*, 2 Dowl. N. R. 904.

And a defendant cannot, without the plaintiff's consent, rule the sheriff to return a ca. sa. which has not been executed. *Daniells v. Gompertz*, 3 Q. B. 322.

*Rule for returning writ after change of sheriff.]* In order to obtain an attachment against the "late" sheriff, for not returning a writ, it is not sufficient that the order was directed to "the sheriff," although the "late sheriff" had returned the writ, but not in due time. *Regina v. The late Sheriff of Cornwall*, 7 Dowl. 600.

And if an attachment have issued, the court, upon application, will set it aside for irregularity, with costs. *Thomas v. Newman*, 2 Dowl. N. R. 33.

At any time whilst the sheriff, to whom a writ of fi. fa. has been directed, is in office, or within six months after he goes out of office, he may be ruled or ordered to return the writ, at the instance either of the plaintiff or defendant, but not afterwards. *Yrath v. Hopkins*, 2 C. M. & R. 250; 3 Dowl. 711.

*Sheriff's return to fi. fa.—priority of writs.]* Declaration against the Sheriff of Middlesex, for a false return to a writ of fi. fa. First count for seizing and levying, and falsely returning nulla bona. Second count for not levying on the goods of the debtor in their bailiwick, out of which they might have levied. The defendants pleaded to the first count, that they did not seize or take any goods of the debtor, nor levy the debt thereout; and to the second count, that there were no goods of the debtor in their bailiwick, out of which they could have levied. The defendants proved that a writ, at the suit of another creditor, had

been delivered to them long before the delivery of the plaintiff's writ. This prior writ was not acted upon at the time of its delivery, but when the sale of the goods, &c., of the debtor took place subsequent to the delivery of the plaintiff's writ, the proceeds of the sale, after satisfying the landlord's rent, were first applied to satisfy the prior writ, and nothing was left to satisfy the plaintiff's writ:—Held, that the return of nulla bona was a good return, and that the defendants were entitled to a verdict on both issues, as the term “goods and chattels” of the debtor must be intended to mean, goods and chattels available to the plaintiff's writ. *Heenan v. Evans and another*, 11 Law J., C. P. 1.

*Sheriff's return to several writs of fi. fa. delivered at the same time.]* Where an attorney, acting for seven plaintiffs in different actions, delivered seven writs of fi. fa. to the sheriff, in one bundle, at the same time:—Held, that the sheriff could not call upon the plaintiffs or their attorney to say which writs were to have priority. Semble, that a return to the effect that he had received the writs at the same time, and had levied under all, would be a good return. *Ashworth v. Earl of Uxbridge, and other plaintiffs in separate actions v. same*, 12 Law J., Q. B. 39.

*Where the execution of a fi. fa. is suspended by the plaintiff, and another writ issues, the sheriff must levy under the second writ.]* Where a writ of fi. fa. is delivered to the sheriff, with directions to suspend the execution, and in the mean time another writ is delivered by another creditor, the sheriff is bound to levy under the latter writ in preference to the former, although the former writ was not delivered with any fraudulent intent to protect the goods of the debtor. *Hunt v. Hooper and another*, 1 Dowl. & L. 626.

*A warrant with instructions sent to a sheriff's officer, does not constitute him a special bailiff, and release the sheriff.]* A plaintiff's attorney sent two writs of ca. sa. to the under-sheriff, with the following letter:—“Enclosed you will receive a ea. sa. in each of the above actions. I will thank you to procure and forward warrants upon each to M. T., sheriff's officer at N., whom I have instructed as to the execution thereof.” The attorney also wrote to M. T., directing him to levy, and instructing him where to find the defendant:—Held, not to amount to an appointment of M. T. as special bailiff. *Alderson v. Davenport*, 1 Dowl. & L. 966, Ex.

The mere fact of a plaintiff requesting the sheriff to direct his warrant to a particular officer does not constitute the latter a special bailiff, so as to render him the plaintiff's agent. *Balson v. Meggatt*, 4 Dowl. 557; 1 Har. & W. 659; and *Corbet v. Brown*, 6 Dowl. 794.

*Sheriff refused relief under the Interpleader Act.]* Where an under-sheriff, acting as attorney for certain creditors of the defendant, informed them of a writ of fieri facias, at the suit of the plaintiff, having been placed in his hands to execute, by which means the issuing of a fiat in bankruptcy against the defendant was accelerated, and the plaintiff's execution thereby defeated, the court refused to grant

the sheriff relief under the Interpleader Act. *Cox v. Balne*, 2 Dowl. & L. 718, Q. B.

*A sheriff is not bound to accept an indemnity.]* Where a sheriff has seized goods under a fi. fa., and a claim to them is put in by another person, he is not bound to accept an indemnity from the execution creditor, but may obtain relief under the 1 & 2 Will. 4, c. 58, s. 6. *Levy v. Champneys*, 2 Dowl. 454, B. C.

*Extent of the liability of a sheriff on failing to bring in the body under a ca. sa.]* Where the sheriff failed to bring in the body under a ca. sa., and an attachment issued against him:—Held, that he was only liable to the plaintiff for not putting in and perfecting bail to the same extent as the bail, viz., for the amount of the debt and costs, and having mistakenly paid the plaintiff the amount of the penalty of the bond, he was entitled to be paid the excess. *Reg. v. Sheriff of Middlesex*, 15 Mee. & W. 146; 3 Dowl. & L. 472; 15 Law J., Ex. 93.

*Action of trespass against a sheriff after an interpleader issue.]* A sheriff having applied for relief under the Interpleader Act, a judge directed the goods to be sold, and the money paid into court, to abide the event of an issue between the claimant and execution creditor. A verdict being found for the claimant, he then brought an action against the sheriff for breaking and entering his dwelling-house, and seizing and converting his goods. The court ordered that so much of the declaration as charged the defendant with seizing and converting the goods should be struck out. *Abbott v. Richards*, 15 Mee. & W. 194; 3 Dowl. & L. 487; 15 Law J., Ex. 330.

*Sheriff under a fi. fa. cannot seize goods deposited as security.]* Under an execution against the goods of A., the sheriff cannot seize goods which A. has deposited with another person as security for a debt. *Rogers v. Kennay*, 15 Law J., Q. B. 381.

*Writ executed by sheriff against the wrong party, but of same name.]* If father and son bear the same name, and a writ of fi. fa. issue against the son, but without the addition of “the younger,” *primâ facie* the father is intended. This is merely a *primâ facie* intendment, and, therefore, if the sheriff under such a writ take the father’s goods, and to an action of trespass by the father, plead that the fi. fa. was issued against him, the *primâ facie* intendment may be rebutted, and the sheriff made liable, by showing that the judgment was obtained and the writ issued against the son.—*Quære*, whether the sheriff could justify under any form of pleading? Semble, that the *writ de identitate nominis* is not the proper remedy for the party whose goods are taken, and that even if it were, it would not take away the right to bring trespass also. The judgment creditor is liable in trespass for the act of the attorney, in directing the sheriff to take the goods of the wrong party. *Jarmain v. Hooper and others*, 13 Law J., C. P. 63.

*Amendment of a clerical error in return to ca. sa.]* Where the sheriff had obtained a rule nisi to amend a clerical error in the return to a ca. sa., costs of opposing it refused. *Cassidy v. Stuart*, 4 Scott, N. S. 187; 2 M. & G. 437.

*Sheriff's return to fi. fa., deducting rent due.]* A return to a fi. fa. stated that the sheriff had paid a sum "for rent due for the premises whereon the said goods and chattels were taken in execution," but without stating that the rent was due at the time of the seizure. On motion to quash the return:—Held, sufficient. *Reynolds v. Barford*, 2 Dowl. & L. 327, C. P.

*Sheriff's officer executing a ca. sa., searching a stranger's house for defendant.]* A sheriff's officer is not justified in entering and searching a stranger's house to arrest a defendant under a ca. sa., although such defendant may have resided there immediately before the entry, and although the officer have reasonable cause to suspect that the defendant is in the house, if the fact be that he was not in the house at the time of the entry and search. *Morrish v. Murray and another*, 13 Law J., Ex. 261.

*Excessive fees taken by sheriff's officer—penalty under 29 Eliz. c. 4.]* Declaration to recover treble damages against defendant as bailiff of the sheriff, on stat. 29 Eliz. c. 4, s. 1:—Held, that statute 7 Will. 4, and 1 Vic. c. 55, only exempted the taking the fees allowed by the judges under that statute from the operation of the penal clause in stat. 29 Eliz. c. 4, and, therefore, what was taken beyond what was warranted by that exemption was excess, for which the action would lie. *Wrightup v. Greenacre*, 11 Jur. 408, Q. B.

*Sheriff's expenses on executions.]* A sheriff is entitled to poundage on the whole amount realised by the sale, although a portion of it is paid over to the landlord for rent; but the sheriff is not entitled to extra expense caused by an adverse claim to the goods. *Davies v. Edmonds*, 12 Mee. & W. 31; 1 Dowl. & L. 395.

On the execution of writs, a sheriff cannot retain for charges and expenses other or larger sums than are allowed by the table of fees, made in pursuance of 7 Will. 4, and 1 Vic. c. 55.—Semblé, if a sheriff has been put to extra expense in the levy, he should apply to a judge to allow it. *Phillips v. Lord Canterbury*, 1 Dowl. & L. 283, Ex.

*Sheriff's poundage fees.]* On a rule calling on the under-sheriff of M. to show cause why he should not answer for his contempt in taking larger fees, as poundage, upon a sale by auction, than are allowed by the courts in the table of fees published under the authority of the act of 7 Will. 4, and 1 Vic. c. 55:—Per cur., the fees which a sheriff is entitled to take under the 29 Eliz. c. 4, are not interfered with by the table of fees allowed under 7 Will. 4, and 1 Vic. c. 55. *Davies v. Griffiths*, 4 Mee. & W. 377; 7 Dowl. 204; 8 Law J., Ex. 70.

The sheriff is only entitled, when levying under an extent, to poundage on the sums actually received by the process. *Rex v. Robinson*, 2 C. M. & R. 334; 4 Dowl. 447.

Under an attachment, he is not entitled to his poundage on the sum levied. *Rex v. Sheriff of Devon*, 3 Dowl. 10, B. C.

On the execution of a ca. sa., the sheriff is not entitled to poundage;

the 43 Geo. 3, c. 46, s. 5, only gives it under executions against the goods. *Hayley v. Racket*, 5 Mee. & W. 620.

Where a writ of ca. sa. had been lodged with the sheriff, with instructions at its foot not to arrest the party, but to return non est inventus, and the defendant voluntarily came and gave himself into custody:—Held, that the indorsement on the writ could only mean that the sheriff was to take no steps, or to use no exertions in endeavouring to arrest the party, but that under the circumstances the sheriff could not do otherwise than detain the defendant; and having arrested the defendant, the sheriff was entitled to his poundage. *Magney and another v. Monger*, 12 Law J., Q. B. 306.

The sheriff has no right to poundage on a fi. fa. delivered to him where the amount of the execution is tendered to him before levy; and a sheriff having refused to take such amount without poundage, and the defendant having paid poundage under protest, the court determined, on motion, that the sheriff must pay it back again. *Colls v. Coates*, 3 P. & D. 511; 11 Ad. & E. 826; and *Brun v. Hutchinson*, 2 Dowl. & L. 43; 13 Law J., Q. B. 244.

*Costs payable to a sheriff, attachment for.]* Where costs are to be paid to the sheriff, who goes out of office, a power of attorney, executed by the under-sheriff, is sufficient to sustain an attachment. *Regina v. Mattey*, 6 Dowl. 515, B. C.

*Expenses of execution, what are.]* The costs of an interpleader rule obtained by a sheriff, or other similar officer, cannot be considered as “expenses of the execution,” which may be levied under the stat. 43 Geo. 3, c. 46, s. 5. *Hammond v. Nairne*, 9 Mee. & W. 221.

*Sheriff's expenses of levy, where judgment and execution set aside.]* Where the sheriff levied under a fi. fa., and received the money, and afterwards the judgment and execution being set aside for irregularity, and the money ordered to be returned, paid it back with the assent of the plaintiff:—Held, that the stat. 43 Geo. 3, c. 46, does not take away his remedy by action of debt against the plaintiff for his poundage. *Rawsthorne v. Wilkinson and others*, 4 M. & Sc. 256.

*Sheriff's fees reduced on taxation—costs of taxation.]* Where a sheriff takes a greater amount of fees than by the scale under the 7 Will. 4, and 1 Vic. c. 55, he is entitled to receive, and on taxation under a judge's order, by consent, the amount of his claim is reduced, the court cannot compel him to pay the costs of taxation under sec. 4, that section only applying to cases where the taxation has proceeded in consequence of a complaint to the court under sec. 3. *Curlewis v. Bird*, 1 Dowl. N. R. 752.

*Attachment against a sheriff, staying proceedings on.]* Where an attachment is issued against the sheriff, for not returning a writ of venditioni exponas, it is no objection to an application to stay proceedings under the attachment on terms, that it is strictly regular, and the sheriff in contempt, and although the application is made after a return to the fi. fa., in which the value of the goods seized was not stated. *Reg. v. The Sheriff of Herts*, 9 Dowl. 916.

## SETTING ASIDE OR STAYING PROCEEDINGS.

*Setting aside proceedings, not sanctioned by the plaintiff.]* On an application by the defendant, to set aside the writ of summons and subsequent proceedings, on the ground that they were not sanctioned by the plaintiff, it appeared in answer to the rule, that the action was brought to recover arrears of maintenance money, under a deed of separation, of which the plaintiff was trustee; and that after the action was commenced, the plaintiff, in whose name it was necessary to bring the proceedings, and who had been told of the writ having been issued, and offered an indemnity, wrote to the attorneys who issued the summons, refusing her assent to the action. There was, however, no affidavit from her, and it was sworn that she had refused to carry out the trusts of the deed, as it was believed, in collusion with the defendant. The court discharged the rule with costs. *Anster v. Holland*, 10 Jur. 786, Q. B.

*Setting aside proceedings, the defendant not served with process.]* Unless it be distinctly shown, that process has not come to the knowledge of a defendant, the court will not set aside proceedings upon a statement, that defendant has not been served with, or had notice of, the process. *Emerson v. Brown*, 7 Man. & G. 476; 8 Scott, N. R. 219.

An affidavit made for the purpose of setting aside proceedings in the cause, in which the defendant alleged that he had not been personally served with process or copy, without negativing the fact of the process or copy coming to his hands, will not be sufficient, such process or copy having been left with his assistant at his house. The rule granted upon such affidavit will be discharged with costs. *Hodges v. Ormond*, 3 Law J., C. P. 232.

*Staying proceedings in an action brought against good faith.]* Where a judge's order for staying proceedings in an action brought against good faith was made in Trinity vacation, and a motion to set aside that order was not made until Michaelmas term:—Held, that the mere lapse of time was not sufficient to preclude the application, no injury having accrued to the defendant thereby.

Every court has an unlimited power over its own process, and may stay proceedings brought against good faith, though the agreement, in fraud of which the action was brought, was made whilst the parties were not under the authority of the court. *Cocker v. Tempest*, 7 Mee. & W. 502.

*Staying proceedings in a second action for the same cause.]* The court refused to stay the proceedings in an action, on the ground that a former action between the same parties had been brought for the same cause, and had been settled by the defendants paying the debts and costs therein. *Ross v. Jacques*, 10 Law J., Ex. 306; 8 Mee. & W. 135.

A plaintiff who sued the hundred for damage done to his house by a riotous assembly, commenced his action in the King's Bench. He afterwards brought another for the same cause, in the Exchequer, but forbore to proceed in it, waiting to see the result of the former, and

merely bringing the second action to be within the time limited by the statute. The Court of King's Bench, on motion, made a rule for him to elect, within a given time, in which action he would proceed, and that the other should be thereupon discontinued. *Miles v. The Inhabitants of Bristol*, 3 B. & Ad. 145; 1 Law J., K. B. 193.

*Staying proceedings on replevin bond.]* The court will not stay the proceedings on a replevin bond, unless it clearly appears that the application is made on behalf of the sureties, and not of the principal. *Warton v. Blacknell*, 12 Mee. & W. 558; 1 Dowl. & L. 650.

Proceedings in a replevin suit may be stayed by a judge's order at chambers, on payment of the penalty and costs of the plaintiff in the suit: replevin bonds are not an exception to the general rule. *Branscombe v. Scarbrough*, 6 Ad. & E., N. S. 13, overruling *Lord Lonsdale v. Church*, 2 T. R. 388.

*Staying proceedings in several actions on same replevin bond.]* The assignee of a replevin bond, without any sufficient reason for so doing, brought separate actions against the principal and the sureties. The court, upon payment of the costs in one action, stayed proceedings in all. *Bartlett v. Bartlett*, 11 Law J., C. P. 223.

*Judge's order for staying proceedings on payment, &c., defendant's consent.]* The rule of the 12th June, 1845, as to obtaining judge's orders for signing judgment, which requires that the defendant's "written consent be attested by an attorney acting on his behalf," has not the force of a rule of court; and, where a judge's order for signing judgment was obtained, on a written consent, attested by an attorney acting for the plaintiff, the court held the attestation sufficient in law, and refused to set aside the order and judgment signed thereon. *Dixon v. Sleddon*, 15 Mee. & W. 427; 15 Law J., Ex. 284, 10 Jur. 599.

*Staying proceedings in several actions on the same contract.]* Several actions were brought by the same plaintiff on the same contract, against the members of a railway company. A judge's order was obtained for staying proceedings in all but one, unless the plaintiff would elect on which of them he would proceed. The court rescinded the order. *Newton and another v. Belcher*, 10 Jur. 1030; 16 Law J., Q. B. 37.

Where a plaintiff brought separate actions against several joint contractors, who were unable to plead their nonjoinder in abatement, and who were not willing to be bound by the result of the verdict in any one of such actions, the court refused to stay the proceedings in all the actions, except in such one as plaintiff should elect to proceed with. *Giles v. Tooth*, 10 Jur. 948; 16 Law J., C. P. 3.

Where separate actions are brought against several joint contractors for the same debt, the court, upon payment of the debt and costs in one action, will stay proceedings in the other actions without costs. *Newton v. Blunt*, 16 Law J., C. P. 121.

*Staying proceedings, rule for, on the last day of term.]* The court will not grant a rule for staying proceedings on the last day of term. *Doe d. Smith v. Hardy*, 4 Dowl. 356.

*Staying proceedings, debt being recoverable in county court.]* An affidavit to stay proceedings, on the ground that the debt was recoverable in the county court, should state that the defendant was residing in the county at the commencement of the proceedings. *Dowling v. Powell*, 12 Law J., Ex. 295.

Where a foreign attachment had been sued by the plaintiff out of the Lord Mayor's Court, to seize money in the hands of bankers to a railway company, only provisionally registered, but no further steps had been there taken against the garnishee, the court refused to stay proceedings in an action subsequently brought in this court against three of the provisional committee of the railway company, in which the same debt was sought to be recovered as for work and labour done for the company. *Denton v. Maitland and others*, 15 Law J., Q. B. 332.

*Staying proceedings by judge's order until the 5th day of term, motion when to be made.]* A cause was tried before the under-sheriff in vacation, and upon an application to a judge at chambers, he made an order staying all further proceedings until the 5th day of the following term, in order that an application might be made to the court:—Held, that a motion made (in pursuance of such order) on the 5th day of the following term, was too late. *Roberts v. Foulkes*, 1 B. C. Rep. 205.—*Patteson, J.*

*Summons on its return is a stay of proceedings.]* A summons to plead several matters returnable in vacation at the hour the Judgment Office opens on the day after the time for pleading expires, is a stay of proceedings, although the time for pleading has been enlarged. *Spenceley v. Shoals*, 5 Dowl. 562.

*Summons to stay proceedings waived by delivery of plea.]* A summons to stay proceedings on payment of debt and costs is waived by a delivery of a plea before the summons is due. *Barton v. Warren*, 3 Dowl. & L. 142, 10 Jur. 375.

*Staying proceedings by certificate of Speaker of the House of Commons.]* The rule to stay proceedings in an action on the production of a certificate from the Speaker of the House of Commons, under 3 Vic. c. 9, s. 1, is absolute in the first instance. *Stockdale v. Hansard*, 9 Law J., Q. B. 218; 11 Ad. & E. 297.

*After judgment signed on certificate given at Nisi Prius the judge cannot stay proceedings.]* Where a judge at Nisi Prius has granted a certificate for speedy execution, under the stat. 1 Will. 4, c. 7, s. 2, and final judgment has been signed accordingly, the judge has no power afterwards to order a stay of proceedings. *Lander v. Gordon*, 7 Mee. & W. 218; 10 Law J., Ex. 39.

*Judge's order for staying proceedings set aside, and action brought on the agreement for the order.]* Plaintiff agreed with defendant to withdraw the record in an action on two checks, which stood ready for trial in the Exchequer, upon the terms that defendant should pay the debt, interest and costs, on or before a certain day, or in default of

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payment, that plaintiff should be at liberty to sign judgment, and that a judge's order should be given to secure payment. The Court of Exchequer having afterwards set aside the judge's order, which had been made in pursuance of the above agreement, plaintiff brought an action on the agreement in the Court of Common Pleas:—Held, that these facts formed no ground for staying the proceedings in the action in the Court of Common Pleas. *Wade v. Simeon*, 3 Dowl. & L. 27; 1 C. B. 610.

*Proceedings will not be stayed because the plaintiff is proceeding at the same time in bankruptcy.]* A party may take proceedings under the 5 & 6 Vic. c. 122, s. 11; and at the same time proceed by action at common law for the recovery of the same debt. The plaintiff had made and filed an affidavit of debt against the defendant; and afterwards served the defendant with a notice, under the statute requiring immediate payment; and also at the same time, with a writ of summons in an action indorsed for the same debt, with 2*l.* 2*s.* costs. The defendant afterwards paid the debt, but declined to pay the 2*l.* 2*s.* for costs. The court refused to stay proceedings in the action. *Covington v. Hogarth*, 2 Dowl. & L. 619; 7 Man. & G. 1013; 14 Law J., C. P. 31.

*Order to stay, &c. on payment of debt and costs, set aside on terms.]* In assumpsit by the holder of checks, and issue on a plea that they were given for money lost at play, and whilst the cause stood for trial on December 7th, an order was made by consent, on the 6th, for payment of the debt and costs; on the 14th the defendant having discovered fresh evidence, applied to set aside the order:—Held, that whilst the matter was in fieri and something remained to be done by the court to give effect to the arrangement, it had jurisdiction to consider whether it was equitable and just, and on terms made the rule absolute. *Wade v. Simeon*, 13 Mee. & W. 647; 2 Dowl. & L. 658.

*Order to stay, &c. on payment of debt, costs, and incidental expenses.]* A judge's order directed a stay of proceedings on payment of debt and costs, with a stipulation, that in default of payment the plaintiff should be at liberty to sign judgment, issue execution, and levy the debt and costs, together with the costs of execution, sheriff's poundage, officer's fees, and all other incidental expenses:—Held, that the sheriff was right in refusing to levy as "incidental expenses" the costs of a rule to return the writ. *Hutchinson v. Humbert*, 10 Law J., Ex. 418.

*Staying proceedings by a feme sole, who afterwards marries.]* If an action be brought against a feme sole, and a judge's order be made by consent to stay proceedings, on payment of the debt and costs by a certain day, otherwise final judgment; and before that day she intermarries, and on the day in question default is made; judgment may still be entered up against her by her maiden name, and she may be taken in execution under a capias ad satisfaciendum, awarded against her alone. *Thorpe v. Argles*, 1 Dowl. & L. 831, Q. B.

*Application to stay proceedings on payment of a sum, refused—sub-*

*sequent costs.]* Where, after writ issued, the defendant applies to a judge to stay proceedings on payment of a certain sum and costs, and the plaintiff refuses to accept the sum offered, alleging that more is due, but at the trial recovers no more; he is entitled to full costs, unless the amount offered has been paid into court. *Clark, administratrix, &c. v. Dann*, 3 Dowl. & L. 513, Ex.

Where the cause of action arose within the jurisdiction of a county court, and a sum of money under 40s. paid into court, under a rule to stay proceedings, omitting the usual undertaking by the defendant to pay the costs, and the defendant offered to give the plaintiff judgment within the first four days of the term after the assizes, for the amount paid into court, in order that the question of costs might be decided by the court, and also required the plaintiff's attorney to inform him whether he intended to proceed for a larger sum, to which an evasive answer was returned, and the plaintiff proceeded to trial, and recovered nominal damages:—The court set aside the verdict, and stayed the proceedings, directing the costs subsequent to the offer, to be paid by the plaintiff. *Jones v. Owen*, 1 Law J., Ex. 181; 2 C. & J. 476; 2 Tyrw. 452.

*Staying proceedings upon payment of debt and costs.]* A judge at chambers has no power before declaration to order that proceedings be stayed upon payment of debt and costs within a certain time, otherwise judgment for the plaintiff. *Reynolds v. Sherwood*, 8 Dowl. 183, Ex.

A judge at chambers cannot, in making an order for staying proceedings on payment of debt and costs, direct that the defendant shall have a longer time to pay than he would otherwise have if the cause proceeded. *Kirby v. Ellier*, 2 C. & M. 215; 2 Dowl. 219.

A defendant who moves to stay proceedings on payment of debt and costs, is not entitled to a rule for that purpose as a matter of right, but must submit to such reasonable terms as the court in its discretion may think proper to impose. *Jones v. Shepherd*, 3 Dowl. 421, Ex.

### SPECIAL CASE.

*Special case, abortive—costs of.]* Where, after verdict, the parties, at the suggestion of the court, agreed to state a special case, and the plaintiff accordingly drew and delivered to the defendant a case which was rendered abortive by the defendant's default:—Held, that the plaintiff, who had the general costs of the cause, was not entitled to any costs of the abortive special case. *Foley v. Botfield*, 16 Law J., Ex. 3.

*Special case, signature of counsel to.]* A verdict having been taken for the plaintiff, subject to a special case, the terms of which were to be settled by a barrister, and the barrister having settled the case, the defendant refused to procure the signature of a serjeant to it; the court granted a rule, that unless the defendant, within a week, caused the case to be properly signed, the postea should be delivered to the plaintiff. *Doe d. Phillips v. Rollins*, 15 Law J., C. P. 186.

*Special case stated after the death of one of the parties.]* Where a cause was by order of Nisi Prius referred to a barrister to state a

special case, and the case was stated after the death of the defendant, the court refused to set it aside. *James and another v. Crane and another*, 3 Dowl. & L. 661; 15 Law J., Ex. 232.

Where after a verdict taken, subject to a special case, but before the terms of it settled, the lessor of the plaintiff died:—Held, to be no ground for setting aside the verdict, but that the court would compel security for costs. *Doe v. Stephens*, 2 Dowl. & L. 993; 10 Jur. 570.

*Special case drawn by referee—counsel's signature.]* Where a verdict has been given subject to a special case, to be turned into a special verdict, and both parties have agreed to the nomination of a referee to draw and settle the special case, the signature of counsel to such case is unnecessary. And, although the counsel on one side had signed, and counsel on the other side refused to sign, a rule for striking the case out of the paper for irregularity was discharged. *Price v. Quarrell*, 11 Law J., Q. B. 84.

*Special case should be confined to questions of law, not of fact.]* The court will not in general take upon themselves the office of a jury in deciding upon a special case, submitted to them by agreement of the parties, when the principal questions are questions of fact, to be decided upon the conflicting testimony of witnesses whose credit is made matter of question. *Brockbank v. Anderson and another*, 13 Law J., C. P. 102.

## TAXATION.

*Notice of taxation, when may be given.]* By rule T. T., 1 Will. 4, one day's notice must be given to the opposite party before taxation; but a notice given before nine o'clock at night is good for the next day. *Edmund v. Cates*, 4 Mee. & W. 66; 6 Dowl. 667.

If the defendant has not appeared no notice need be given. *Burch v. Poynter*, 3 Mee. & W. 310; 6 Dowl. 387.

*Taxation, notice of, where defendant has appeared.]* Although a defendant may have appeared in an action, and the plaintiff taxes his costs, without giving notice of taxation, that is not an irregularity sufficient to induce the court to set aside a judgment and subsequent proceedings. *Lloyd v. Kent*, 5 Dowl. 125.

*Notice of taxation, consequence of not giving.]* Where the plaintiff had taxed his costs without giving notice of taxation to the defendant, and issued execution, the court, upon affidavit of merits made by the defendant, set aside the judgment and subsequent proceedings without payment of costs. *Ilderton v. Sill*, 9 Jur. 948; 15 Law J., C. P. 1.

*Notice of taxation not necessary where plaintiff appears sec. stat.]* No notice of taxation is necessary where the plaintiff appears for the defendant sec. stat.; although the defendant's attorney afterwards takes out and serves a summons for time to plead. Such summons is not tantamount to an appearance, within the rule of H. T. 4 Will. 4, s. 17. *Welch v. Vickery*, 15 Mee. & W. 59.

And a bill of costs need not be delivered before taxation. *Burch v. Pointer*, 3 Mee. & W. 310; 7 Law J., Ex. 63.

A notice to tax at Westminster in term is good. *Blake v. Warren*, 8 Dowl. 173.

*Copy of affidavit of increase must be delivered with notice.]* The affidavit of increase must be sworn one day before taxation, and delivered with the notice of taxation. *Todd v. Fellingham*, 8 Dowl. 372, Ex.

*Taxation of costs of bill of exceptions.]* The court of error must order the taxation of the costs of a bill of exceptions, and not the court below. *Doe d. Harvey v. Francis*, 4 Mee. & W. 331; 7 Dowl. 193.

*Taxation between attorney and client—discretion of the master.]* The "directions to the taxing officers" of T. T., 7 Vic., do not prevent the master from allowing an attorney, as against his client, the costs of counsel, retained by express direction of the client, and with full knowledge that such costs could not be recovered against the opposite party. *In re J. C. Smith*, 2 Dowl. & L. 376, Ex.

*A submission to taxation is an admission of retainer.]* Where an attorney's bill is referred generally to the officer for taxation, he cannot take into his consideration the question of retainer; that is tacitly admitted by the submission to taxation. *Nelson v. Slack*, 2 M. & Sc. 820.

*Taxation after plea of payment into court.]* A sum of money had been offered to a plaintiff in satisfaction of his demand, which he declined to accept; but subsequently on its being paid into court, with a plea of such payment, he took it out. The court will not interfere to give the defendant his costs, or point out the mode of taxation, unless the defendant has been before the master. *Roe v. Cobham*, 6 Scott, 146; 6 Dowl. 628; and *Head v. Baldrey*, 8 Ad. & E. 605.

*Order for taxation without undertaking to pay, no stay of proceedings.]* A summons and order to tax an attorney's bill without an undertaking to pay what shall be found to be due, do not operate as a stay of proceedings, so as to prevent the attorney from suing out a writ after the order is obtained. *Williams v. Roberts*, 1 C. M. & R. 670; 4 Law J., Ex. 78.

*Taxation of attorney's bill after action brought, without prejudice.]* Where an attorney's bill contains taxable items, the court has authority, after action brought, to refer it for taxation, without requiring any admission of liability on the bill, or imposing any other terms upon the defendant. *Williams v. Griffith*, 9 Law J., Ex. 185.

*Taxation—jurisdiction of master as to negligence.]* On taxation of an attorney's bill the master has no jurisdiction to disallow items on

the ground that in respect of the business to which they refer the attorney was guilty of negligence.

Where A. and B. delivered a bill in their joint names for business done as attorneys, and the master on taxation disallowed part of the bill, on the ground that B. was not a certificated attorney during a portion of the time to which the bill referred, the court, on affidavit that B.'s name was used at the request of friends, but that he was really not a partner with A. allowed A. to deliver a fresh bill in his own name only, for the items so disallowed. *Matchett v. Parkes*, 9 Mee. & W. 767.

Although the master, on taxation, has not jurisdiction to determine whether acts done by the attorney were useful, he may determine what were necessary. *Heald v. Hall*, 2 Dowl. 163.

Where the master has disallowed certain costs on taxation between party and party, as being unnecessarily incurred ; and the attorney afterwards sues his client for the same costs, which are again disallowed on taxation ; the court will not inquire into the propriety of the master's decision. *Nichols v. Williams*, 11 Law J., Q. B. 190.

Where there appears to be negligence or ignorance of law on the part of an attorney, which creates unnecessary costs, the court will order those costs to be disallowed on taxation, without prejudicing his right to bring an action for them. *Cliffe v. Prosser*, 2 Dowl. 21.

On a rule to show cause, why the master should not review his taxation of costs, it appeared that the master had allowed only half the charge for preparing briefs, conceiving them to have been hastily prepared, for the sake of costs. The court refused to interfere. *Buckland v. Boydell*, 7 Scott, 171.

*Taxation of agency bills.]* A bill for agency business is not taxable under the 6 & 7 Vic. c. 73. *In re Gedye, between Gedye and Elgie*, 14 Law J., Q. B. 238 ; 2 Dowl. & L. 915 ; and *Weymouth v. Knipe*, 3 Bing. N. S. 387 ; 5 Dowl. 495.

*Taxation of bill of costs on which action is brought—delivery of bill—agency.]* Where the plaintiff, an attorney, was employed by the defendant, also an attorney, to go into the country to defend a person charged with bribery at an election, had delivered two bills of costs, one in November, 1841, and another in June, 1842, both of which were unsigned, payments on account having been made ; plaintiff in order to sue for the balance, delivered in February, 1847, signed bills, copies of the former bills delivered, and at the expiration of a month sued on the same ; defendant applied for and obtained a judge's order for the taxation of the signed bills. On a motion to set aside the judge's order on the grounds that the bills had been delivered more than 12 months, and that being bills for agency business were not taxable :—Held, on the first point that the signed bills being delivered within six months were taxable, and on the second point that they were not agency bills. *Billing v. Coppock*, MS. Exch. T. T. 1847.

*One attorney employed by another as an advocate—bill of costs.]* Where one attorney employed another to advocate the cause of his client before an arbitrator, it was held that the bill of the party so

employed could not be referred for taxation, for it was business done as an advocate, not as an attorney. *Re Simons*, 14 Law J., Q. B. 41; 2 Dowl. & L. 500.

*Taxation according to the lower scale, under rule H. T. 4 Will. 4.]* If the plaintiff's claim be reduced by a cross demand below 20*l.* the reduced scale of taxation is right. *Savage v. Lipscombe*, 5 Dowl. 385.

If proceedings be stayed by judge's order on payment of 11*l.*, the costs must be taxed on the lower scale. *Cook v. Hunt*, 7 Dowl. 397.

An action having been settled, and proceedings stayed by judge's order, on the payment of less than 20*l.* into court, the master having taxed on the usual scale, and a judge by order directed him to review his taxation and tax on the lower scale, according to rule H. T. 4 Will. 4, the court would not rescind such order, on a suggestion that the cause is one which would have been proper to be tried before a judge. *Keppell, Clk. v. Shillson and another*, 12 Law J., Q. B. 323.

Where a cause is referred, and the award under 20*l.*, the costs are to be taxed on the reduced scale. *Hallen v. Smith*, 5 Mee. & W. 159; 7 Dowl. 394; and *Wallen v. Smith*, 3 Mee. & W. 138; 6 Dowl. 103.

If, upon reference to the master, an attorney's bill be reduced to a small balance, the master may tax upon the lower scale. *Parker v. Serle*, 6 Dowl. 334.

The rule H. T. 4 Will. 4, which directs that in assumpsit, debt, or covenant, where the sum recovered shall not exceed 20*l.*, the plaintiff's costs shall be taxed according to the reduced scale, applies to a defendant's costs where he succeeds.

Where a writ of trial to the sheriff had been applied for by the plaintiff and refused, the demand being under 20*l.*, and the defendant obtained judgment as in case of a nonsuit, the master having taxed the defendant's costs on the reduced scale, the court refused to review the taxation. *Williamson v. Heath*, 12 Law J., Q. B. 168.

The directions to taxing officers, H. T. 4 Will. 4, do not apply, in terms, to a defendant's costs. A defendant's costs may be within the spirit of the directions, and in such cases the court will not interfere, where the master has taxed a successful defendant's costs upon the reduced scale. But, where in an action brought to recover the sum of 5*l.*, as a fine payable on the admission of the defendant to copyhold premises, the plaintiff obtained a special jury, and upon reference of the cause to arbitration the defendant succeeded, but obtained no certificate that it was a fit cause to be tried before a judge, the master having taxed the costs upon the usual scale:—The court held, that he had done rightly. *Richardson v. Kensit*, 13 Law J., C. P. 17.

*Taxation where verdict for 20*l.*, and cause could not be tried before sheriff.]* *Walther v. Mess*, 14 Law J., Q. B. 230. See Costs, p. 81.

*Taxation of costs of several issues at different times.]* In trover the issue on not guilty was found for the defendant, and other issues for the plaintiff. The defendant taxed his costs on the issue found for him, and they were paid by the plaintiff. Nearly a year after the plaintiff applied to the master to tax the costs of the issues which were found for him, but this the master declined to do. The court refused a rule to set aside a judge's order directing the taxation to be

made. *Watson and others v. Boyes and another*, 14 Law J., Ex. 116.

*Taxation of costs of cross issues.]* Where some issues are found for the plaintiff and some for the defendant, the latter will be entitled to the costs of the witnesses who are called exclusively in support of the issues found for him, but not of those who are also examined to prove the issues found for the plaintiff. *Crowther v. Elwell*, 4 Mee. & W. 71; 7 Law J., Ex. 251; and *Knight v. Brown*, 2 M. & Sc. 797.

Where the defendant is entitled to the general costs of the cause he is entitled to the expenses of the witnesses called in support of an issue upon which he has succeeded, notwithstanding that their evidence was also applicable in support of an issue as to which the jury was discharged. *Butler v. Hobson*, 5 Scott, 824; 7 Law J., C. P. 148.

If a defendant pleads the general issue and several special pleas, and the jury find for him on the general issue, and for the plaintiff on the special pleas, the latter is entitled to the costs of the pleadings and witnesses on those pleas. *Hart v. Cutbush*, 2 Dowl. 456.

Where in an action on the case, a defendant succeeds on one of several issues which goes to the foundation of the plaintiff's cause of action, he will be entitled to the general costs of the cause, although there is a verdict for the plaintiff upon the plea of "not guilty," without damages. *Frankum v. Lord Falmouth*, 4 Dowl. 65.

Where there are several issues, if the pleas found for the defendant taken together form an answer to the whole of the plaintiff's demand, the defendant is entitled to the general costs of the cause, although some issues may have been found for the plaintiff and damages assessed thereon. *Probert v. Phillips*, 2 Mee. & W. 40; 6 Law J., Ex. 10; 5 Dowl. 473.

In trespass for breaking and entering the plaintiff's close and pulling down a gate, the defendant justified under a right of way to a certain river with horses and carts for water and goods. The jury found in favour of the defendant as to the right for water, and against him as to the right for goods. Upon motion to enter the verdict for the plaintiff:—Held, that the plea being in its nature distributive, and part being found for the defendant, and part for the plaintiff, the verdict should be entered for the defendant, on that part found for him, and for the plaintiff, as to the residue. Held, also, that the defendant was entitled to the general costs of the cause, and to the costs of all the witnesses upon the issue as to the right of way for water, although some of those witnesses also gave evidence as to the right of way for goods. *Knight v. Woore*, 6 Law J., C. P. 135; 3 Bing. N. C. 3; 4 Scott, 360; 5 Dowl. 487.

*Taxation of attorney's bill by consent, costs of—no undertaking to pay.]* Where an unsigned bill, delivered by an attorney, was, with his consent, referred by a judge's order to taxation, at which he attended, when more than a sixth was struck off; the court, under its general jurisdiction, ordered him to pay the costs of taxation; although the order contained no undertaking on the part of the client to pay the amount found to be due. *Peters v. Sheehan*, 12 Law J., Ex. 177.

*Taxation of costs on the lower scale, where arbitrator found 17*l.* 3*s.* due.]* Where a cause and all matters in difference were referred to arbitration, the costs of the cause and of the reference to abide the result, and the costs of a cross action between the parties to be also in the discretion of the arbitrator, but no power was given to enter up judgment for the amount awarded; and the arbitrator found that a sum of 17*l.* 3*s.* was due to the plaintiff, and that nothing was due in regard to any other matters in difference between them, and that the costs of the cross action should be borne equally between the parties; and it appeared that the defendant had successfully resisted an application to try the cross action before the sheriff:—Held, the master having taxed the plaintiff's costs on the higher scale, that the court would order a reviewal of his taxation. *Elleman v. Williams*, 2 Dowl. & L. 46, Q. B.

*Taxation of an attorney's bill after payment.]* Payment of an attorney's bill, within the 6 & 7 Vic. c. 73, s. 41, dates from the time at which a bill of exchange or promissory note given in liquidation is paid, and not from the time of the mere delivery of the instrument. *In re H. L. Harries*, 1 Dowl. & L. 1018, Ex.

*Taxation of attorney's bill sued on by his executor.]* The court has no power to refer to taxation an attorney's bill containing taxable items, in an action brought upon it by his executor. *Williams v. Griffith*, 10 Mee. & W. 125.

*Taxation of costs on payment of a less sum than indorsed on writ.]* The defendant is not entitled to have the costs taxed, under the rules H. T. 2 Will. 4, r. 11, and M. T. 3 Will. 4, r. 5, where a less sum than the amount of the debt and costs indorsed on the writ of summons has been paid and accepted within four days of the service, unless it shall clearly appear that the deduction was made from the debt, and not from the costs, or that the plaintiff acknowledged there was a mistake in the amount of the debt indorsed. *Young v. Crompton*, 10 Jur. 248, B. C.—Patteson, J.; 2 Dowl. & L. 557.

*A copy of affidavit of increase must be a correct copy.]* The delivery of a copy affidavit of increase, which, instead of a complete jurat, has only the word "sworn," &c. is not a compliance with the rule of court of Trinity term, 1 Will. 4, s. 10. But for this defect the court will not set aside the judgment, but will only direct a review of the taxation. *Wheldal v. Northern and Eastern Railway Company*, 13 Mee. & W. 9; 2 Dowl. & L. 246.

*Taxation of costs on verdict in favour of one of two defendants.]* An action of trespass was brought against a minor and his father. The minor pleaded not guilty, by his father as his guardian, and the father pleaded two other special pleas, by the same attorney. Upon the trial, a verdict was found for the minor, and against the father; and on the taxation of costs the master allowed no mileage to the defendant's attorney, and only one guinea for his attendance on the trial. He also allowed for only four sheets of the

briefs, and a small proportion of counsel's fees, and only a moiety of the expenses of one witness, who was subpoenaed with another witness to speak to facts material for the son's defence. The court refused to refer back the question as to the allowance in respect of the briefs and the counsel's fees, but directed the master to review his taxation with respect to the mileage and attendance of the attorney, and also the expenses of the two witnesses. *Alderson v. Waistell and another*, 13 Law J., Q. B. 254.

Where two defendants in trespass sever in pleading, but plead the same pleas, all going to the whole action, and one succeeds upon all the issues, the other upon one only, each defendant is entitled to his ex parte costs of the issues on which he has succeeded, and an aliquot part of the joint costs, unless the master is satisfied that, by reason of special circumstances, less ought to be allowed to either. Where defendants appeared by separate attorneys and counsel, but the attorneys were members of the same firm, and the briefs and evidence substantially the same, the master taxed the costs as if the parties had appeared by the same attorney; it was admitted that the taxation, in that respect, could not be disturbed. *Gambrell v. Earl of Falmouth*, 5 Ad. & E. 403; 5 Law J., K. B. 253; 6 N. & M. 859.

*Costs of briefs—allowance of on taxation—discretion of master.]* The master is not bound, in the taxation of costs of briefs, or short-hand writer's notes accompanying them, by the certificate of counsel that they were necessary, but is to exercise his own discretion in the matter, taking the certificate into consideration, together with the other facts. *May v. Tarn*, 12 Mee. & W. 730; 1 Dowl. & L. 997.

There is no general rule that the master, on taxation of costs, shall allow the costs of two briefs only, except where a certain number of witnesses were examined; it is a matter for his discretion on all the circumstances of the case. *Sharpe v. Ashby*, 12 Mee. & W. 732; 1 Dowl. & L. 998.

*The number of counsel in a cause allowed on taxation.]* The number of counsel in general allowed is to be in the discretion of the master. *Grindall v. Godman*, 5 Dowl. 378.

*Taxation of costs—affidavit of increase—payment of witnesses.]* The practice of the court requires that the witnesses in a cause should be actually paid before an affidavit of increase is made; and if such appears not to be the case, the court will order the sums sworn to be paid and allowed by the master to be refunded. *Trent v. Harrison*, 14 Law J., Q. B. 210.

*Costs of taxation after action brought.]* Where an order is obtained to tax an attorney's bill, after action brought thereon, and the defendant then pays the amount found to be due into court, which the plaintiff takes out, the costs of the taxation of the bill are rightly taxed to the plaintiff as costs in the cause. *Thomas v. Mayor, &c. of Swansea*, 11 Mee. & W. 83.

*Costs of taxation after action brought.]* Where an attorney's bill

is referred to taxation after action brought upon it, the attorney is liable, under 6 & 7 Vic. c. 73, s. 37, to pay the costs of taxation, if more than one-sixth is struck off. *Ex parte Woollett*, 12 Mee. & W. 504; 1 Dowl. & L. 593.

*Verdict for plaintiff in action for an attorney's bill subject to taxation.]* Action on an attorney's bill; verdict for the plaintiff, subject to taxation of the bill, within the first five days of the ensuing term. Defendant having omitted to tax the bill within that time:—Held, that the plaintiff was entitled to sign judgment, and tax his costs. *Tucker v. Neck*, 4 Bing. N. C. 113; 5 Scott, 393; 6 Dowl. 231.

*Costs of taxation of attorney's bill after action brought thereon.]* Where an attorney's bill is delivered one month before, and no order for taxation obtained till after action brought, the defendant is not entitled to the costs of taxation, although the master reduces the bill by more than one-sixth. *Robinson v. Powell*, 9 Law J., Ex. 17.

*Cost of interrogatories not used on the trial disallowed on taxation.]* The master having refused on taxation to allow the costs of examining a witness upon interrogatories, the interrogatories not having been offered in evidence at the trial:—Held, no ground for the reviewal of taxation. *Curling and others v. Robertson*, 2 Dowl. & L. 307, C. P.

*Taxation of costs of witness—subsistence money.]* At the defendant's instance, the trial was postponed from the summer to the following spring assizes. The defendant afterwards obtained an order for stay of proceedings, upon payment of the sum for which the action was brought and costs. After the postponement, the plaintiff obtained an order for the examination of a witness, a master of a vessel, who was about to leave England; but the plaintiff, having received notice of the defendant's intention at the trial to attack the credit of this witness, abandoned the order, and on the advice of counsel detained the witness in this country:—Held, that the plaintiff in this exercised a proper discretion, and that the master was right in allowing, on the taxation of costs, subsistence to this witness, from the service of the subpœna until when the action was stayed. *Evans v. Watson*, 10 Jur. 818.

*Reviewing taxation.]* Affidavits used before the master on the taxation of costs cannot be read on showing cause against a rule for reviewing the taxation, unless they are referred to in the rule; a notice that they will be used is sufficient. *Cliffe v. Prosser*, 2 Dowl. 21.

Where it was alleged in an affidavit that certain sums, sworn to in an affidavit of increase, had not been paid, the court directed the taxation to be reviewed by the master. *Pembrey v. Jones*, 11 Jur. 589, B. C.

Where, in an attorney's bill of costs, several items, not for fixed fees but of a discretionary nature, had no charges set opposite to them, and others were charged, some too low and some too high; and the master, on taxation, reduced the latter to the proper scale, but declined to increase the former, or to insert the charges omitted alto-

gether; the court refused to review the taxation. *Eyre v. Shelley*, 8 Mee. & W. 154.

An application to review the taxation of costs ought not to be made before the master has made his allocatur, as he has not, until doing so, finally decided what costs he will allow. *Sellman v. Boorn*, 8 Mee. & W. 552.

*Taxation of costs on order of Nisi Prins made a rule of court after the death of defendant.]* A judge at the assizes made an order to postpone a cause to the next assizes, the defendant forthwith to pay to the plaintiff the costs of the day to be taxed. This order was afterwards made a rule of court, before which however the suit having abated by the death of the defendant, the court refused to order the costs to be taxed with a view to the plaintiff's issuing execution under the 1 & 2 Vic. c. 110, s. 18. *Hill v. Brown*, 11 Jur. 290.

*Interest not allowed on taxation of attorney's bill.]* The master has no power to allow an attorney interest on the amount of his bill, although the attorney have given notice to his client, under the stat. 3 & 4 Will. 4, c. 42, s. 34, that he should claim interest; even where the reference for taxation is after action brought, interest cannot be allowed, unless a stipulation to that effect were made in the order. *Berrington v. Phillips*, 1 Mee. & W. 48.

### TERM'S NOTICE.

*Term's notice not necessary by defendant.]* The rule requiring a term's notice prior to proceedings being taken, where the cause has been at issue more than four terms, does not apply to proceedings taken on the part of the defendant. *Skinfield v. Laxton*, 4 M. & Sc. 187.

*Term's notice unnecessary where delay was at defendant's request.]* A term's notice of proceeding by the plaintiff is not necessary after the lapse of four terms, if the delay has taken place at the defendant's request. *Evans v. Davis*, 3 Dowl. 786.

*Term's notice not necessary for costs of the day.]* The rule requiring a term's notice of proceeding does not extend to a motion for costs of the day, for not proceeding to trial. *French v. Burton*, 1 Law J., Ex. 257; 2 C. & J. 634.

*Term's notice to discharge rule for new trial.]* A term's notice of motion to discharge a rule for a new trial is necessary where no proceedings have been taken for more than four terms after the rule has been obtained. An order, by consent, to change the defendant's attorney is not a proceeding in the cause so as to render such notice unnecessary. *Deacon v. Fuller*, 2 Law J., Ex. 175; 1 Dowl. 675; 1 C. & M. 349.

*A term's notice not necessary on proceedings after verdict.]* The rule, that a term's notice is necessary where no proceeding has been

taken in a cause for a year, does not apply to proceedings had after verdict. *Newton and Wife v. Boodle and others*, 11 Jur. 148, C. P.; 16 Law J., C. P. 135.

*Term's notice where rule for new trial not acted upon for more than a year.]* Semble, that where a rule for a new trial has been obtained on payment of costs, a term's notice should be given, after the lapse of more than a year, of a motion to discharge it. *Lord v. Wardle*, 5 Law J., C. P. 259.

VENUE—*Changing of.*

*Changing venue from town to country—effect on time to plead.]* A rule to change the venue from town to country, drawn up as a stay of proceedings on the day on which the time for pleading expired, and served before the plaintiff has signed judgment, has the effect of giving the defendant eight days' time to plead, instead of four, unless the venue be brought back. A judgment, therefore, signed for want of a plea, after service of the rule:—Held, irregular. *Nicholls v. Stockbridge*, 11 Law J., C. P. 292.

*Changing the venue in an action for a libel.]* In an action for a libel, contained in a letter written in Buckinghamshire, when it did not appear that it had been circulated elsewhere, the court allowed the venue to be changed from London to that county, on the usual affidavit. *Tallent v. Morton*, 1 M. & P. 188.

Where a libel is published in two counties, and the defendant changes the venue, the plaintiff may bring it back. *Clementson v. Newcomb*, 1 C. M. & R. 77.

*Changing the venue in an action on contract.]* The venue may be changed in an action on a written contract which is to be performed in a particular place, and for the breach of which the cause of action arises wholly in one county; and semble, that it may be so changed in all actions on contracts, though in writing, except on specialties, bills, and notes. *Mondel v. Steele*, 8 Mee. & W. 640.

*Where the venue cannot be changed.]* The court will not change the venue if it appears on the face of the declaration that the contract on which the action is brought is in writing or by deed. *Picard v. Featherstone*, 4 Bing. 39.

Nor can the venue be changed in an action on an award. *Stanway v. Heslop*, 3 B. & C. 9; 4 D. & R. 635.

The defendant cannot change the venue after an order for time to plead, “on the usual terms,” either in town or country causes, whether the trial will be delayed or not. *Notts v. Curtis*, 2 C. & J. 345; 2 Tyrw. 307.

But an order to “plead issuably” does not prevent the defendant from changing the venue. *Russell v. Hart*, 1 C. & M. 184; 3 Tyrw. 218.

*Venue brought back without undertaking to give material evidence.]* Where the venue, in an action for freight, had been changed on the

usual affidavit, it was brought back upon affidavits, stating only that the cause of action and the contract for the conveyance of the goods and payment of freight, on account of which the money in the declaration was claimed, arose and were entered into at Newfoundland, and not in the county into which the venue had been changed, without the plaintiff undertaking to give material evidence in the county where the venue was originally laid. *Cundell v. Harrison and others*, 16 Law J., Q. B. 81.

In an action for a libel published in a newspaper, the court made the rule for carrying back the venue absolute, with costs, without an undertaking on the part of the plaintiff to give material evidence in the county to which the venue was thus carried back. *Easthope v. Westmacott*, 6 Law J., C. P. 245.

*Undertaking to give material evidence in the county to which the venue is brought back.]* An undertaking to give material evidence in the county in which the venue is changed, in an action for goods sold and delivered, is satisfied by proof of letters, containing invoices of goods, having been put into the post office in that county at the time the goods were forwarded. *Linley v. Bates*, 2 C. & J. 659.

A plaintiff's undertaking to give material evidence in the county, is satisfied, by proof of a letter of the defendant, admitting part of the debt, posted in such county, and received by the plaintiff in another county. *Hall v. Storey*, 16 Law J., 17, Ex.

Proof of a conversation with the defendant in the cause, referring to the matters involved in it, taking place after the writ is sued out, will satisfy an undertaking to give material evidence in the county where the conversation took place. *Gosling v. Birnie*, 1 M. & M. 531.

*Changing the venue.]* After a plea in abatement the venue cannot be changed. *Wigley v. Dubbins*, 12 Moore, 91; 4 Bing. 18.

Although the general rule is, that a motion to change the venue on special grounds, cannot be made until after issue joined, yet if the pleadings and facts of the case are such that the court cannot fail to see what the issues joined must be, the application may be granted before issue joined. *Dowler v. Collis*, 4 Mee. & W. 531.

*Change of venue—power of court.]* The court has power under 5 & 6 Will. 4, c. 76, s. 109, to direct an action, the venue of which is laid in the city of Bristol, to be tried in the adjoining county, the exception in 38 Geo. 3, c. 52, s. 10, being repealed, as well in civil as in criminal proceedings. *Cole v. Gane*, 15 Law J., Q. B. 22.

*Venue retained on undertaking to give material evidence.]* Where the venue has been retained in the county in which it was originally laid, on undertaking to give material evidence in that county, it is no ground of nonsuit that the plaintiff has not given material evidence in that county, unless the objection be taken at Nisi Prius. *How v. Pickard*, 2 Mee. & W. 373.

*Changing the venue, in debt for use and occupation.]* The defendant may change the venue on the usual affidavit, in an action of debt for use and occupation. *Herring v. Watts*, 2 Dowl. & L. 609, C. P.

*Changing the venue where a corporation is concerned.]* A cause being connected with a corporation is no ground for changing the venue. *Thornton v. Jennings*, 7 Dowl. 499; 5 Bing. N. S. 485.

## VERDICT.

*Verdict in debt with pleas of payment and set-off.]* To debt for goods sold and delivered, the defendant pleaded as to 33*sl.*, parcel of the monies demanded in the declaration, payment, and also a set-off. It was proved, that only 31*l.* was actually paid, but a set-off to the amount of 21*l.* was established, and 33*sl.* was the full value of the goods sold:—Held, that these pleas were divisible, and that the defendant was entitled to judgment, on the plea of payment to the amount of 31*l.* and on that of set-off to the amount of 21*l.*, and the plaintiff was entitled to judgment for the residue on those pleas; but there being a plea of *nunquam indebitatus*, the defendant was entitled to judgment on the whole record. *Cousins v. Paddon*, 5 Law J., Ex. 49; 2 C. M. & R. 547; 4 Dowl. 488.

*Verdict in covenant—several counts and one breach only.]* Where there are several counts on one agreement, of which there is only one breach, the court will limit the verdict to one count, and will only allow the costs of one. *Ward v. Bell*, 1 C. & M. 848; 2 Law J., Ex. 271; 2 Dowl. 76.

*Verdict subject to a reference stands, if reference be not proceeded with.]* Where a verdict is taken, subject to a reference, which is not proceeded with, the plaintiff cannot take the cause down to trial again whilst the verdict stands. *Hall v. Rouse*, 4 Mee. & W. 24; 6 Dowl. 656.

*Verdict delivered after the return day of writ of trial.]* The court will not award a *venire de novo* where, on a writ of trial, the jury, having retired to deliver their verdict, came into court and delivered it after the conclusion of the return day, neither party having made any objection previous to the delivery of the verdict. *Pinkney v. Brett*, 11 Law J., Q. B. 9.

*Verdict on issues in fact, venire omitting the assessment of damages on demurrer.]* Where judgment on demurrer had been given for the plaintiff, and on the trial, all the issues in fact were found for him, the court refused to set aside the trial, on the objection that the *venire facias juratores* was only to try the issues, and not to inquire of the damages on the demurrer; saying, that the defect was amendable, and that they would leave the party taking the objection to his writ of error. *Wood v. Peyton*, 14 Law J., Ex. 28.

*Verdict taken generally where some counts are bad—venire de novo.]* A declaration contained some good and some bad counts. At the trial evidence was given on all, and the verdict passed for the plaintiff, with general damages. The defendant moved in arrest of judgment; and the plaintiff having obtained from the judge who tried the cause an order to amend the postea, by confining the verdict to a good

count, the order was set aside, and a *venire de novo* awarded. *Emerson v. Griffin*, 9 Law J., Q. B. 23; 3 P. & D. 160.

*A verdict may be general if the jury so desire.]* On a motion for a new trial, the court held, that a jury are not bound to find any other than a general verdict, although the judge directs them to find specially as to a particular fact on which a legal question may be raised; and where they refused the court would not disturb the verdict. *Mayor of Devizes, &c. v. Clark*, 3 Ad. & E. 506.

*Entry of verdict, on a fact left by the judge being found.]* The judge at Nisi Prius told the jury, that in case of their believing a fact, the verdict must be for the plaintiff; the jury having retired, returned into court and told the associate, who alone was there, that they found the fact; the associate then informed them that this was a verdict for the plaintiff, and entered it so, but the jury expressed to him their dissent, and said they were not agreed to find for the plaintiff. The court discharged a rule nisi obtained on affidavit of these facts, for setting aside the verdict and having a new trial, upon the ground (only) of the jury not having agreed to find for the plaintiff. *Doe d. Lewis v. Baster*, 5 Ad. & E. 129.

*Recording verdict.]* Where, in trover, the jury found for the plaintiff, but accompanied their verdict with a statement in writing, that, whether the goods were delivered to the defendant as a loan or a gift, they ought to have been returned, which the associate refused to receive:—Held, that he was right, it amounting to a mere expression of their private opinion. *Whittell v. Bradford*, 5 Scott, 711.

*Effect of verdict for plaintiff without damages.]* To an action on the case, the defendant pleaded, first, not guilty; secondly, a plea as to which the jury were discharged; thirdly, that the plaintiff had not sustained damages beyond 5*l.* Issues having been joined on these pleas, the plaintiff had a verdict on the first issue, without damages, and the defendant a verdict on the last issue. The plaintiff had obtained the postea:—Held, that the defendant was entitled to the postea as the record then stood, and that unless the judge who tried the cause amended it, by adding nominal damages, a *venire de novo* must issue. *Grout v. Glazier*, 10 Law J., Ex. 276.

Where the plaintiffs, upon the trial of a cause, had obtained a verdict upon some issues, and the defendant upon others, which went to the whole cause of action, and no damages were assessed, but the plaintiffs afterwards had judgment non obstante veredicto upon the pleas on which the defendants had succeeded:—Held, that the plaintiffs were bound to take the risk of issuing a writ of inquiry to assess damages, upon themselves; and the court would not make absolute a rule calling on the defendants to show cause, why a writ of inquiry should not issue. *Pim and another v. Reid and others*, 1 Dowl. & L. 512; 12 Law J., C. P. 299.

*A verdict subject to a special case—subsequent death of plaintiff.]* Where on the trial of an action of ejectment a verdict was taken, subject to a special case, and before the terms of it were settled the lessor

of the plaintiff died:—Held, that this formed no ground for an application for setting aside the verdict, or staying proceedings in the action; but that the court would compel the plaintiff to find security for costs. *Doe d. Earl of Egremont v. Stephens*, 2 Dowl. & L. 993, Q. B.; 10 Jur. 570.

## WARRANT OF ATTORNEY.

*Form of attestation to warrant of attorney.]* A warrant of attorney was attested as follows:—"Signed, sealed, and delivered in the presence of H. Whitaker, 10, Lincoln's Inn, attorney for the said Lord Kensington, expressly named by him, and attending at his request, and I hereby subscribe myself to be the attorney for him, having read over and explained to him the nature and effect of the above warrant of attorney before the same was executed by him, and I hereby subscribe my name as a witness to the due execution thereof:" there was no further subscription of the name of the witness; but the above signature, "H. Whitaker," was the name and was in the handwriting of the witness:—Held, that the above signature was a sufficient subscription by the witness; secondly, that the form of the attestation was a substantial compliance with the requisitions of 1 & 2 Vic. c. 110, s. 9, and sufficiently showed that H. W. was the attorney for the defendant, and that he subscribed as such attorney. *Lewis v. Lord Kensington*, 15 Law J., C. P. 100.

*Form of attestation to cognovit or warrant of attorney.]* A cognovit was attested as follows:—"Duly executed by the above-named Robert Gibbs, in the presence of me, the undersigned Samuel Balden, attorney on behalf of the said Robert Gibbs, expressly named by him, and attending at his request. And I do hereby declare that I subscribe my name as witness to the due execution hereof by the said Robert Gibbs, and as his attorney, and that previous to the execution hereof by the said Robert Gibbs I informed him of the nature and effect hereof. Samuel Balden, attorney:—"Held, that this was a sufficient attestation. *Phillips v. Gibbs*, 10 Jur. 971; 16 Law J., Ex. 48.

A warrant of attorney was attested in the following form:—"Signed, sealed, and delivered by J. A., in my presence, and I subscribe myself as attorney for the said J. A., expressly named by him to attest his execution of these presents:—"Held, by Alderson, B., to be insufficient; Parke, B., dubitante.

But assuming such attestation to be bad:—Held, that it was not such gross negligence as to preclude the attorney of the creditor from recovering his charges in respect of the warrant of attorney, it having been set aside as defective. *Elkington v. Holland*, 9 Mee. & W. 659.

A warrant of attorney was attested in the following form:—"Signed in the presence of me, A. J. C., and I declare myself to be attorney of the said R. G., expressly named by him, and attending at his request, and subscribe myself accordingly, A. J. C." :—Held, that the word "accordingly," meant as such attorney, and that the attestation was therefore sufficient. *Lindley v. Girdler*, 1 Dowl. & L. 699, Q. B.

*Attorney attesting warrant of attorney—his subscription.]* Where the subscription of the attorney to the attestation omitted to add that

he signed as such attorney for the party :—Held, insufficient, although so described in the attestation clause. *Everard v. Poppleton*, 5 Ad. & E., N. S. 181; 1 D. & M. 222.

*Warrant of attorney executed abroad.]* Where in a warrant of attorney executed abroad, without any clause of attestation, as required by 1 & 2 Vic. c. 110, s. 9, the court set aside the judgment which had been entered ; although the defendant was an outlaw, he was still entitled to the protection of the court against proceedings irregularly taken against him, although not capable of putting the law in force for his benefit until he has obtained a reversal of his outlawry. *Davis v. Trevanion*, 2 Dowl. & L. 743.

*Warrant of attorney, alteration after execution.]* A party executed a warrant of attorney to confess judgment for 1000*l.*, in the presence of an attorney, who subscribed his name as a witness to the execution as attorney for him, pursuant to 1 & 2 Vic. c. 110, s. 9. The warrant of attorney was afterwards altered, by consent, by changing the sum to 2000*l.* The attorney was present, and passed a dry pen over the attestation, and over his own signature :—Held, that the warrant was not duly subscribed. *Bailey and others v. Bellamy and others*, 10 Law J., Q. B. 41.

*Warrant of attorney, time for filing.]* Under the statute 3 Geo. 4, c. 39, s. 1, which directs warrants of attorney to be filed within twenty-one days after their execution, a warrant executed on the 9th day of the month is filed in sufficient time, if filed on the 30th. *Williams v. Burgess and another*, 10 Law J., Q. B. 10.

*Warrant of attorney must be filed in due time.]* Where the warrant was not filed within twenty-one days after its execution, as prescribed by the 3 Geo. 4, c. 39 :—Held, invalid, although the judgment and execution thereon issued before a commission of bankruptcy issued ; and that the assignees were entitled to the proceeds in assumpsit for money had and received, against the creditor, although the goods had been assigned to him by the sheriff in specie, after appraisement of the value, in satisfaction of the debt. *Bittleston v. Cooper*, 14 Mee. & W. 399.

*Warrant of attorney, date of execution.]* Where a warrant of attorney is filed twenty-one days after execution, under 3 Geo. 4, c. 39, with an affidavit made by the attesting witness, stating that the deponent was present on the 4th April, 1844, and saw the within-named W. H. R. sign, seal, and, as his act, deliver the warrant of attorney, it is sufficiently shown that the deponent saw defendant execute the warrant on the day and year named. *Robinson v. Robinson*, 3 Dowl. & L. 134; 10 Jur. 356, B. C.—Coleridge, J.

*Attorney attesting, warrant of attorney.]* The attorney attesting being named to the defendant by the plaintiff's attorney will, under circumstances, be sufficient. *Taylor v. Nicholl*, 6 Mee. & W. 91; 8 Dowl. 242.

Where a defendant, who is about to execute a warrant of attorney,

declines the attendance of his own usual attorney, but adopts freely an attorney suggested by the plaintiff's attorney, that is a sufficient nomination of an attorney by the defendant, pursuant to 1 & 2 Vic. c. 110, s. 9. *Hale v. Dale*, 8 Dowl. 599, B. C.

Where three defendants go to a particular attorney named by the plaintiff, and give him instructions to prepare a joint warrant of attorney from them to the plaintiff, and each of the defendants freely recognizes the attorney as acting for him, the warrant is good, notwithstanding the provisions of the 1 & 2 Vic. c. 110, ss. 9, 10; *Haigh v. Frost*, 7 Dowl. 743, B. C.

But the fact of the name of the attorney attesting the defendant's execution having been suggested by the plaintiff's attorney:—Held, to be a ground for setting it aside, as not being a compliance with the statute. *Kemp v. Matthew*, 8 Scott, 399; and *Rice v. Linstead*, 6 Scott, 895.

Nor is it a sufficient compliance with 1 Reg. Gen. H. T. 2 Will. 4, s. 72, that an attorney should be named by the plaintiff, and adopted by the defendant in custody on mesne process, when executing a warrant of attorney. *White v. Cameron*, 6 Dowl. 476, B. C.

Where a party went to an attorney's office for the purpose of executing a warrant of attorney, and found the plaintiff, the plaintiff's attorney, and the attorney's brother, also an attorney, there; and the plaintiff's attorney read from the warrant of attorney, and the defendant repeated after him, a form of words, nominating the brother as the defendant's attorney:—Held, that such a nomination was sufficient. *Walton v. Chandler*, 14 Law J., C. P. 149.

Where the attorney for the defendant was his usual attorney, and named expressly by him on the occasion, yet it appearing that the same person was acting for the plaintiff, and prepared the security:—Held, not a compliance with the statute. *Rising v. Dolphin*, 8 Dowl. 309, B. C.

The provisions of 1 & 2 Vic. c. 110, s. 9, rendering necessary the presence of an attorney on behalf of any person executing a warrant of attorney, do not apply to the case of a warrant of attorney given in an action of ejectment. *Doe d. Kingston v. Kingston*, 11 Law J., Q. B. 73.

Where, on the execution of a warrant of attorney, there is only one attorney present, it ought to be clear that he is not the plaintiff's attorney. *Sanderson v. Westley*, 6 Mee. & W. 98; 8 Dowl. 412.

Where a party giving a warrant of attorney is himself an attorney, no other attorney need be present at its execution. An application to set aside a warrant of attorney on such a ground cannot be sustained by a third party. *Chipp v. Harris*, 5 Mee. & W. 430; 9 Law J., Ex. 64.

If a prisoner seeks to take advantage of 1 Reg. Gen. H. T. 2 Will. 4, s. 72, on the ground of the absence of an attorney on behalf of the prisoner, at the execution of a warrant of attorney, it is incumbent on him to show that he is in custody on mesne process, and it is not necessary for the plaintiff to show that the defendant is not. *Lewis v. Gompertz*, 6 Dowl. 7.

A debtor, being arrested, offered a warrant of attorney; the plaintiff's attorney, who had also advised the defendant in previous stages of the business, came at his request to the place where he was in cus-

tody, and proposed another attorney, whom he brought with him, to read over the warrant of attorney to the defendant, and attested it on his behalf. The defendant acquiesced; but the attorney so introduced was not known to or sent for by him:—Held, that this was not a compliance with the rule E. T. 4 Geo. 2, (and see Reg. H. T. 2 Will. 4, 72,) which declares, that no warrant of attorney executed by a person in custody of the sheriff, &c., shall be valid, unless there be present an attorney on his behalf, to be expressly named by him, and attending at his request, to witness it; and the warrant of attorney and proceedings thereon were set aside for irregularity. *Walker v. Gardner*, 4 B. & Ad. 371.

Where a defendant requests the plaintiff's attorney to procure for him an attorney to attest his execution of a warrant of attorney, the attestation of an attorney so introduced to the defendant is good within sec. 9 of 1 & 2 Vic. c. 110. *Joel v. Dicker*, 11 Jur. 589, B. C.

*Judgment on warrant of attorney—attesting witness residing abroad.]* An affidavit by the plaintiff, that the defendant was indebted to him on an old warrant of attorney, and that he had not paid the sum secured by it,—that he saw the defendant execute it, and that the attesting witness was also present, but was now residing in France, and that the defendant was now alive:—Held, sufficient to entitle the plaintiff to enter up judgment. *Taylor v. Leighton*, 3 M. & Sc. 423.

*Judgment on warrant of attorney—attesting witness having absconded.]* Where the attesting witness to a warrant of attorney is the clerk of the attorney preparing it, the want of his affidavit, on signing judgment, is sufficiently supplied by that of his master verifying the handwriting of his clerk and of the defendant, and stating that the former has absconded, and cannot be found. *Young v. Showler*, 2 Dowl. 556.

*Judgment on warrant of attorney, by executors or administrators of plaintiff.]* Where a warrant of attorney only authorizes judgment to be entered up at the suit of the plaintiff, without mentioning executors, administrators, &c., the court will not allow judgment to be entered up at the suit of the plaintiff's executors, although representatives are mentioned in the defeasance. *Manvill v. Manvill*, 1 Dowl. 544; and *Foster v. Claggett*, 6 Dowl. 524.

Where a warrant of attorney refers to the plaintiff, "his executors and administrators," but the affidavit of execution makes no mention of executors or administrators, the court will not allow judgment to be entered up. *Baldwin v. Atkins*, 2 Dowl. 591.

In a more recent case of this kind, the court allowed judgment to be entered up, on the condition of producing an amended affidavit of attestation. *Hulin v. Powell*, 6 Law J., C. P. 236.

*Judgment on warrant of attorney given by a married woman dum sola.]* Judgment may be entered up against a husband on a warrant of attorney given by his wife dum sola. *Higginbottom v. Higginbottom*, 8 Dowl. 126.

Where judgment is signed by mistake against a married woman

alone, on a warrant of attorney given by her dum sola, a rule nisi only will be granted for vacating that judgment, and signing another against the husband and wife. *Pocock v. Fry*, 8 Dowl. 126.

*Warrant of attorney by a marksman.]* Semble, that the court will not grant permission to enter up judgment on an old warrant of attorney executed by a marksman, where it was only sworn that the warrant was "duly executed," and it is not stated that it was read over to the defendant. *James v. Harris*, 6 Dowl. 184, C. P.

*Warrant of attorney given as a guarantie.]* Where the warrant was given as a guarantie, an affidavit that the guarantie still remained in force and effect:—Held, sufficient, although not stated that any sum was due. *Pickering v. Carnell*, 8 Dowl. 300, B. C.

*Warrant of attorney void if given for illegal consideration.]* Where a charge of embezzlement having been preferred before a magistrate, by A. against B., and during an adjournment of the case, for the purpose of procuring further evidence, the magistrates being of opinion that a partnership existed between the parties, a warrant of attorney was, on the 13th October, given by B.'s father to A. for a sum which, on an investigation of the accounts, appeared to be due from his son, and on the 15th of October, no further evidence being produced, the charge was dismissed:—Held, that the warrant of attorney was given for an illegal consideration, as at the time when it was executed a charge of a criminal nature was pending, which it was calculated to bring to an end. *Ex parte Geo. Critchley the elder*, 15 Law J., Q. B. 124.

*To set aside a warrant of attorney for illegal consideration.]* The affidavits in support of a motion to set aside a warrant of attorney, on the ground that it has been given to compound a felony, should state a specific agreement to that effect; or, at least, such facts as leave no doubt that such an agreement has been made. *Ward v. Lloyd*, 1 Dowl. & L. 763, C. P.

*Appearance entered on a warrant of attorney where the court is not expressly named.]* Where a warrant of attorney was directed to J. W. C., and H. J., "attorneys of his Majesty's Court of King's Bench," authorizing them "to appear for the defendant, as of" &c., and "there to receive a declaration for him;" and thereupon, "to suffer judgment, &c. to be forthwith entered up against him of record of the said court;" and the defeasance provided that it should not be necessary to revive the judgment after the lapse of a year and a day, "any rule, &c., in the said Court of King's Bench, to the contrary, notwithstanding:"—Held, that an appearance was properly entered for the defendant in the Court of King's Bench, no other court being mentioned in the warrant of attorney. *Harris v. Peck*, 2 Dowl. & L. 106, Q. B.

*Judgment on warrant of attorney may be set aside by defendant though a bankrupt.]* Upon an application to set aside the execution upon a judgment under a warrant of attorney, if it appear that the

party applying has some interest, the court will not look to the amount of it:—Held, therefore, that the application might be made by a defendant against whom a fiat in bankruptcy had afterwards issued, and which was in the course of operation, as he had an interest to increase the divisible fund to be distributed under the fiat. *Pinches v. Harvey*, 10 Law J., Q. B. 316.

*Judgment signed on warrant of attorney after the death of defendant, an insolvent, set aside.]* An insolvent, on his discharge, executed a warrant of attorney, pursuant to the 7 Geo. 4, c. 57, s. 57, (of which the provisions are re-enacted by 1 & 2 Vic. c. 110, s. 87). After the insolvent's death, the assignees obtained an order from the Insolvent Court to enter up judgment; and it was entered up accordingly. The judgment was set aside upon motion by the executors of the insolvent. *Harden and another, assignees, &c. v. Forsyth, deceased*, 10 Law J., Q. B. 132.

*On a judgment on a warrant of attorney an alias fi. fa. may issue without entering continuances on the roll.]* In August, 1841, the defendant executed to the plaintiff a warrant of attorney, with a defeasance. Judgment was signed thereon on the 13th September, 1841, but the roll was never carried in. By a judge's order, obtained by consent on the 9th September, 1842, it was ordered that execution should issue on the judgment without a sci. fa. On the 14th September a fi. fa. was issued, which was returned nulla bona on the 29th September, and filed on the 20th December, 1842. In April, 1845, an alias fi. fa. was issued under which the defendant's goods were taken. He afterwards became a bankrupt:—Held, first, that the judge's order was not void as against the assignees, under 3 Geo. 4, c. 39. Secondly, that the alias fi. fa. was regular; for that, since the statutes 2 Will. 4, c. 39, and 3 & 4 Will. 4, c. 67, succeeding writs of execution need not be tested on the return day of the preceding writ, and may be sued out at any time afterwards, without the necessity of entering continuances on the roll. *Harmer v. Johnson*, 14 Mee. & W. 336; 3 Dowl. & L. 38.

*Judgment entered up in vacation on a warrant of attorney.]* A warrant of attorney authorised certain persons to appear for the defendant, “as of Trinity term now last, Michaelmas term now next, or some other subsequent term, then and there to receive a declaration,” &c. &c. Judgment having been entered up on the 15th March, (in vacation) the court set that judgment aside for irregularity; but (independently of the question of entering the judgment in term or vacation):—Held, that the instrument would have been satisfied by the entry up of judgment at a period subsequent to that at which the declaration was received; and that, supposing the declaration to have been received in a term, it would have been competent to the plaintiff to enter up judgment in vacation, notwithstanding such judgment was required by the instrument to be “thereupon forthwith” entered up. *Rayment v. Smith*, 1 Dowl. & L., Q. B. 166.

*Judgment on warrant of attorney after the death of defendant.]* Judgment cannot be entered up on a warrant of attorney after the

death of the defendant without having it revived by sci. fa. *Heath v. Brindley*, 4 N. & M. 235.

*Signing judgment on warrant of attorney.]* It is no objection to signing judgment on a warrant of attorney under fifteen years old, that the defendant is insane. *Piggott v. Killick*, 4 Dowl. 287, B. C.

Where a warrant of attorney is executed to two persons, and one dies, the survivor may enter up judgment in his own name. *Hind v. Kingston*, 6 Dowl. 523, B. C., and *Spong v. Tucker*, 1 Y. & J., 206.

Where a warrant of attorney is given to three for a joint debt due to them, and no mention is made either in the warrant or defeazance of survivors, judgment, however, may be entered up at the suit of the survivors. *Build v. Wightman*, 1 Dowl. 545, B. C.

*Judgment on warrant of attorney—no suit pending—title of affidavit.]* An affidavit in support of a motion for entering up judgment on a warrant of attorney (given when no suit is pending) need not be entitled in any cause. *Davies v. Stanbury*, 3 Dowl. 440, Ex.

*Judgment on warrant of attorney—affidavit of defendant being alive.]* In order to obtain leave to sign judgment on an old warrant of attorney, it is necessary to show that the defendant was "alive," and not merely "seen," within a reasonable time before the application. *Chell v. Oldfield*, 4 Dowl. 629, B. C.

In appearing to sign judgment on a warrant of attorney, it is insufficient for the deponent to swear that he believes the defendant to be alive from information which he has received, unless he also swears that he believes the information to be true. *Reeder v. Whip*, 5 Dowl. 576, B. C.

It has been held sufficient if the affidavit states that the defendant was "seen alive within ten days." *Krell v. Jay*, 4 Dowl. 600, B. C.

And in a subsequent case upon an affidavit that the defendant had been seen and conversed with by the deponent twenty-seven days before the motion was made. *Powell v. Howard*, 6 Scott, 826, C. P.

Where a defendant was seen alive in England on the 20th February, the court allowed judgment to be signed against him in Easter term, on an old warrant of attorney, although he was then resident in France, but in what part was unknown. *Bayley v. Western*, 7 Dowl. 601, B. C.

Where a defendant is resident in the West Indies, a judgment may be signed against him on a warrant of attorney if seen alive four months before. *Fursey v. Pilkington*, 2 Dowl. 452, B. C.

The court allowed judgment to be entered up on an old warrant of attorney on the 5th November, the defendant not having been seen alive since the 30th of the previous September. *Stocks v. Willes*, 5 Dowl. 221, B. C.

On applying for judgment on an old warrant of attorney, it is sufficient proof of the defendant being alive that a letter in his handwriting has been received. *Gray v. Withers*, 4 Dowl. 636, B. C.

And it is sufficient proof of the defendant being alive to show that a cheque of his has been paid, dated thirteen days before the application. *Jacobs v. Griffiths*, 5 Dowl. 577, B. C.

Judgment was allowed to be entered up on an old warrant of attorney on the 17th of May, although the defendant had not been seen since the 23rd of April previous. *Watts v. Bury*, 4 Dowl. 44.

*Joint warrant of attorney—when judgment may be signed against one.]* Where the warrant of attorney is to suffer judgment to be entered up against two, or either of them, judgment may be entered up against one only. *Jordan v. Farr*, 2 Ad. & E. 437; 4 N. & M. 347.

And on a warrant of attorney to confess judgment to two, judgment may be entered up in favour of a survivor. *Johnson v. Jenkins*, 1 Dowl. 367.

On a joint and several warrant of attorney, given by two persons, judgment was signed against one only, but as the attorneys were authorized to enter up judgment against both, the court allowed it to be done, and held, that an affidavit, stating that the party against whom the judgment was signed, put in an answer to a bill in Chancery, within the term, was sufficient proof of his being alive. *Stoveld v. Eade*, 3 M. & Sc. 361.

*Joint warrant of attorney—one defendant an infant.]* The three defendants, one of whom was an infant, entered into a warrant of attorney, on which judgment was entered up; on a rule for setting aside the judgment, upon the ground of one of the defendants being an infant, the court ordered the name of the infant to be struck out, and discharged the rule as to the two adults, with costs. *Ashlin v. Langton*, 4 M. & Sc. 719; 3 Law J., C. P. 264.

*Joint warrant of attorney, wheu not severall.]* A warrant of attorney, executed by two persons, authorized attorneys to appear for us and each of us, and to receive a declaration for us and each of us, in an action of debt, and thereupon to confess the same action, or else to suffer judgment by nil dicit, or otherwise to pass against us in the same action, and to be thereupon entered up against us and each of us, and after the said judgment shall be entered up as aforesaid, for us and in our names, to execute a release of errors, &c., suffered or done, &c., in the aforesaid judgment:—Held, that this warrant was not severall, and did not authorise a judgment against one of the parties executing it, but only against both. *Dalrymple v. Fraser and another*, 15 Law J., Q. B. 193.

*Judgment on warrant of attorney must not exceed in amount the sum authorised.]* Where a warrant of attorney authorised an appearance to be entered in an action for 200*l.* and judgment to be suffered in the said action for the said (leaving a blank); and an appearance was accordingly entered, and judgment signed for 200*l.*, together with the costs of the suit, amounting to 3*l.* 10*s.*; and afterwards a scire facias was sued out to revive the judgment, and judgment obtained thereon by default, and the defendant, who was in custody, was charged in execution, under a habeas corpus ad satisfaciendum, at the suit of the plaintiff:—Held, on motion to set aside the judgment, and to discharge the defendant out of custody, that the judgment for costs was not authorised by the warrant of attorney, and was therefore a nullity, and must be set aside in toto; and that the court could not amend it, by

striking out that part which referred to the costs, without a rule to amend. *Page v. South*, 2 Dowl. & L. 108, Q. B.

*A warrant of attorney may authorize judgment without application to the court.]* A warrant of attorney contained a clause empowering the party to whom it was given, without applying to the court, to sign judgment and issue execution, notwithstanding a year and a day might have elapsed:—Held, that judgment signed and execution issued within ten years from the date of the warrant was regular, although no application had been made to the court. *Sherran v. Marshall and another*, 1 Dowl. & L. 689, Q. B.

*Warrant of attorney—interest included in judgment.]* Where a warrant of attorney makes no mention of interest on the principal, but the defeazance does, the court will allow execution to be issued for the principal and interest. *Shipton v. Shipton*, 1 Dowl. 518.

Where a warrant of attorney is given to secure payment of a certain sum and interest, judgment cannot be entered up for principal and interest, upon an affidavit stating what is due for interest; but there must be a reference to the master to compute the amount of interest. *Page v. Jadis*, 6 Law J., C. P. 229.

*Judgment on warrant of attorney on office copy of affidavit of execution.]* Judgment may be obtained on an old warrant of attorney, although only an office copy of the affidavit of its due execution is produced. *Webb v. Webb*, 4 Dowl. 599.

*Judgment on warrant of attorney—motion to add interest referred to the master.]* Where the defeazance on a warrant of attorney showed that the debt secured by the instrument was to carry interest, but the penalty in the instrument itself was the amount of the actual debt only, the court, on special application, referred it to the master to find what was due for interest, and authorized judgment to be taken for the penalty and such interest. *Chalk v. Wolton*, 1 Dowl. & L. 39, C. P.

*Judgment on warrant of attorney on affidavit of plaintiff's clerk.]* Leave was granted to enter up judgment on a warrant of attorney, above one and under ten years old, upon an affidavit of the plaintiff's clerk and assistant, by whom the goods, in respect of which the warrant of attorney was given, were supplied. *Cobbbold and another v. Adams*, 10 Jur. 72, B. C.—Patteson, J.

*Warrant of attorney—date of judgment.]* Where a warrant of attorney, dated in July, authorized certain attorneys to appear, &c. “as of Trinity term last, Michaelmas term next, or any subsequent term,” &c., and judgment was signed in August as of the preceding Trinity term:—Held, that this was regular, notwithstanding the rule H. T. 4 Will. 4, s. 3, which provides, that “all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other time.” *Jarvis v. South*, 13 Mee. & W. 152; 1 Dowl. & L. 962.

*Judgment on warrant of attorney—appearance unnecessary—when objection must be taken.]* On the 6th February, 1845, judgment was signed on a warrant of attorney, without entering an appearance for the defendant. A fi. fa., issued thereupon, was executed on the 24th April. A fiat in bankruptcy issued against the defendant on the 5th May. On the 26th May application was made to the court on the part of the assignees to set aside the judgment and execution :—Held, first, that it was not necessary to enter an appearance. Secondly, that if the omission was an irregularity, it was waived by the delay in making the application. *Charlesworth, P. O., &c. v. Ellis*, 10 Jur. 92, Ex.

*Judgment on warrant of attorney signed in vacation—when objection must be taken.]* A judgment against a bankrupt will not be set aside for irregularity, unless the assignees apply within four days after they have notice of it.

A judgment signed in vacation is valid, when the warrant of attorney authorized it to be entered up “as of the term.” *Alcock v. Sutcliffe*, 11 Jur. 126; 16 Law J., Q. B. 129.

*Warrant of attorney—judgment entered up in vacation.]* The plaintiff on the 30th November (in vacation) entered up judgment, not “as of Michaelmas term,” upon a warrant of attorney given in 1838, and authorizing him to sign judgment as of last Trinity term, next Michaelmas term, or any subsequent term. The writ of fi. fa. thereon was executed December 6th. The defendant became bankrupt December 18th, and assignees were appointed on the 3rd January. On the 15th April an application was made by the assignees to set aside the judgment and execution :—Held, that the irregularity in the judgment had been waived by the time which had elapsed.

Semble, per Tindal, C. J., a warrant of attorney, given to appear and sign judgment as of a term, does not authorize a signing of judgment in vacation. *Bate v. Lawrence*, 13 Law J., C. P. 147.

A judgment entered up on the 4th day of January, 1844, as of Michaelmas term, 7 Vic., on a warrant of attorney, given by a party in 1835, to appear as of last Hilary term, next Easter term, or any subsequent term, and then and there, &c.:—Held, bad.

Held, also, that in the absence of proof, the court would not presume that the appearance and receipt of the declaration had been in term. *Bird v. Manning*, 13 Law J., Q. B. 123.

*Judgment on warrant of attorney more than a year old, on affidavit of plaintiff's attorney.]* In order to obtain leave to enter up judgment on a warrant of attorney more than one year old, the affidavit of the plaintiff's attorney, who negotiated the loan for which it was given, and still continued to act for him, that the debt remained due :—Held, sufficient. *Hill v. Enoe*, 13 Law J., Q. B. 65.

*Judgment on warrant of attorney signed more than a year—execution thereon.]* Where, by the defeazance to a warrant of attorney, it appears to have been in the contemplation of the parties that execution should be had after a year and a day from the signing of the

judgment, it is not necessary that the plaintiff should sue out a scire facias to revive the judgment; but he is at liberty to sue out execution upon the judgment, after a year and a day, without reviving the judgment by scire facias. *Hiscocks v. Kemp*, 5 N. & M. 113; 4 Law J., K. B. 226.

*Judgment on warrant of attorney more than ten years old.]* The court will not grant a rule absolute in the first instance for judgment on a warrant of attorney more than ten years old, though it be to confess judgment on a bond, and the defendant is resident abroad. *Fletcher v. Everard*, 13 Law J., Q. B. 44.

*Warrant of attorney for a prospective debt illegal.]* A warrant of attorney, given by a client to his attorney, to secure future costs, is illegal. *Jones v. Hunter*, 1 Dowl. 462.

A warrant of attorney, given to secure payment of future costs, and also of costs and money already due and advanced, though void as to the client's future liability, is valid as to his actual liability. *Holds-worth v. Wakeman*, 1 Dowl. 532.

### WITNESS.

*Commission to examine witnesses abroad.]* The application for a commission to examine witnesses under 1 Will. 4, c. 22, must be promptly made after issue joined. Where there had been delay the court allowed the commission, but refused to postpone the trial. *Brydges v. Fisher*, 4 M. & Sc. 458.

Where a defendant applies for a commission to examine witnesses abroad, it is not necessary that he should produce an affidavit of merits, if it appear that the application is made bona fide, and not for the purpose of delay. *Buddely v. Gilmore*, 1 Mee. & W. 55; 5 Law J., Ex. 115; 1 T. & G. 369.

It is not necessary, on applying for a rule nisi for a commission to examine witnesses out of the jurisdiction of the court, to state the names of the examiners. *Fearon v. White*, 5 Dowl. 713.

An action for criminal conversation is a civil action within the 1 Will. 4, c. 22, s. 4, in which the court will grant a commission for the examination of a witness out of the jurisdiction. It is not necessary that the affidavit, in support of an application for such a commission, should state that exertions have been made to procure the attendance of the witness at the trial. *Norton v. Lord Melbourne*, 5 Law J., C. P. 343; 3 Bing. N. C. 67; 3 Scott, 398.

*Examination of witness on interrogatories in a revenue cause.]* In an information by the attorney-general for penalties, the court made absolute a rule that the attorney-general should be at liberty to examine a material witness for the crown (who was too ill to attend the trial) on interrogatories, before the Queen's Remembrancer; but would not make it part of the rule that his examination should be received as evidence on the trial. *Attorney-General v. Reilly*, 13 Mee. & W. 676; 2 Dowl. & L. 690.

*Commission to examine witnesses abroad—affidavit should state the*

*names.]* The affidavit on which to ground a motion for a commission to examine witnesses abroad, must either specify the names of the witnesses proposed to be examined, or in some other way describe them. *Gunter v. M'Tear*, 1 Mee. & W. 201; 5 Law J., Ex. 115; 4 Dowl. 722.

A rule to examine witnesses abroad, under 1 Will. 4, c. 22, s. 4, will be granted, if the names of some of the witnesses proposed to be examined are mentioned in the affidavits, although the names of others are not. *Beresford v. Easthope*, 8 Dowl. 294.

In an application to examine witnesses abroad by a commission, under 1 Will. 4, c. 22, s. 4, the court will allow the commission to go for the examination of witnesses not named in the rule, if the names of certain witnesses are given. *Dimond v. Vallance*, 7 Dowl. 590.

*Commission to examine witnesses for defendant in a revenue cause, not granted.]* In an information by the attorney-general, on behalf of Her Majesty's Customs, the court has no power, either by virtue of its general jurisdiction at common law, or under the 1 Will. 4, c. 22, at the defendant's instance, to direct a commission for the examination of witnesses. It will not use its power of postponing the trial for the purpose of compelling the crown to consent to such commission.

Quære, whether an application by bill on the equity side of the Court of Exchequer can now be sustained. *The Attorney-General v. Bovet*, 15 Mee. & W. 60; 15 Law J., Ex. 155; 3 Dowl. & L. 492.

*Examination of witnesses abroad at the suit of the crown.]* In an action at the suit of the crown, the court has no power, under the 1 Will. 4, c. 22, at the defendant's instance, to direct a commission for the examination of witnesses. *Regina v. Wood*, 7 Mee. & W. 571.

*Commission to examine witnesses abroad directed to judges of a foreign court.]* A commission to examine witnesses, directed to the judges of a foreign court, may be issued without the usual clause, requiring the commissioners to be sworn. *Ponsford v. O'Connor*, 5 Mee. & W. 673.

*Commission to examine witnesses on interrogatories.]* A commission to examine witnesses on interrogatories and cross-interrogatories, was sent out to Belfast, the commissioners being empowered "to put, or cause to be put additional questions, when it should appear to them to be necessary and proper." The defendant, when before the commissioners, abandoned some of his cross-interrogatories, and proposed to put additional questions, to which the plaintiff objected. The commissioners proceeded with the examinations on such questions "subject to the objections." At the trial, the answers to these questions were ruled to be inadmissible in evidence:—Held, that the ruling was right, as the commissioners ought themselves to have decided whether the questions were necessary and proper to be put, and not to have left that question for the determination of the court. *Williamson v. Page*, 3 Dowl. & L. 14; 1 C. B. 464.

Where a witness has been examined before commissioners, the judge at the trial can exclude a portion of his answer to a cross-inter-

rogatory, from the consideration of the jury, as inadmissible, and retain the remainder. *Tufton v. Whitmore*, 12 Ad. & E. 370; 9 Law J., Q. B. 405.

*Examination of witnesses under a judge's order—reception of the evidence at trial.]* Witnesses examined under a judge's order, in expectation of their going abroad, are examined as much for one side as the other, and either party may use their evidence at the trial, if it be shown that the witnesses are abroad; but it must be proved that they are abroad, and the statement in their depositions that they are going abroad is not sufficient for this purpose. *Proctor v. Lainson*, 7 C. & P. 629.

*Witness's expenses, attorney not personally liable for.]* The attorney in a cause is not personally liable to a witness whom he subpoenas to give evidence in the cause for his expenses of attendance. *Robins v. Bridge*, 3 Mee. & W. 114; 6 Dowl. 140.

A promise by an attorney after trial to pay a witness a compensation for his loss of time, cannot, it seems, be enforced either by action or attachment. *Bates v. Sturges*, 2 M. & Sc. 172.

*Allowance of expenses to witnesses.]* The allowance for witnesses is from the first day of the assizes in special jury cases. *Cosgrave v. Evans*, 2 Dowl. 443, B. C.

This ruling was confirmed in *Gilliatt v. Gothard*, MS. Ex. T. T. 1846; and in *Huntingdon v. Grand Junction Railway*, MS. Ex. M. T. 1846.

It is a question for the discretion of the master, whether a witness ought to be allowed expenses for the whole time of his attendance at the assizes, or only a portion of it; but where the master has decided upon it, the court will not review his decision. *Platt v. Green*, 2 Dowl. 216.

The master is, in general, sole judge of what witnesses shall be allowed on taxation; and, therefore, where he had, in an action for libel, disallowed all witnesses to prove inuendoes, the court refused to interfere to make him review his taxation. *Skelton v. Seward*, 1 Dowl. 411.

*Witness's claim of his expenses previously to being examined.]* A witness who is called in an action to depose to a matter of opinion, depending on his skill in a particular trade, has, before he is examined, a right to demand from the party calling him, a compensation for his loss of time; and there is a distinction between a witness thus called, and a witness who is called to depose to facts which he saw. *Webb v. Page*, 1 Car. & K. 23.—Maule, J.

*Witness not obeying a subpoena liable to an action.]* The calling of a witness on his subpoena is matter of evidence only; and an action for not obeying a subpoena ad testificandum will lie though the defendant was never called upon it, if, from other evidence, the jury are satisfied that at the time he was wanted he could not have been present. The time he is wanted is when the counsel, by whom the cause is conducted, requires him to appear and give evidence. It is not necessary to the maintenance of the action that the jury should have

been sworn ; it is enough if the plaintiff is ready to go to trial, and, in consequence of the absence of the witness withdraws the record. *Lamont v. Crook*, 6 Mee. & W. 615 ; 9 Law J., Ex. 253.

*Calling witness on his subpoena.]* The counsel for the plaintiff has a right, on the cause being called on, to have a witness called on his subpoena, without swearing the jury. *Hopper v. Smith*, 1 M. & M. 115.

*A prochein amy may be a witness.]* A prochein amy is not a party to the suit, but simply a person appointed by the court to look after the interests of the infant and manage the suit for him, and therefore he is not within the exception to the general enactment in the stat. of 6 & 7 Vic. c. 85, s. 1, as a party individually named in the record ; and though he be liable to the costs, yet as that statute takes away all objection on the ground of interest, he is a competent witness for the plaintiff. *Sinclair v. Sinclair*, 13 Mee. & W. 640.

*To compel the attendance of witnesses before an arbitrator.]* A rule to compel the attendance of witnesses and the production of documents in their custody before an arbitrator under the 3 & 4 Will. 4, c. 42, s. 40, where the order of reference has been made a rule of court, is a rule absolute in the first instance. *In re Guarantee Society and A. Levy*, 1 Dowl. & L. 907, C. P.

*Costs of witnesses on reference.]* On a reference of a cause and all matters in difference, the costs of the witnesses attending the arbitration are costs of reference, and not of the cause. *Brown v. Nelson*, 13 Mee. & W. 397 ; 2 Dowl. & L. 405.

*Witnesses privileged from arrest while attending an arbitration.]* Where a cause is referred by a deed of submission between the parties, containing a clause that the submission may be made a rule of court, the attorneys of the parties and the witnesses are privileged from arrest during the period of their attendance on the arbitrator. *Webb, P. O. v. Taylor*, 1 Dowl. & L. 676, Q. B.

*Objection to the competency of a witness.]* An objection to the competency of a witness may be taken at any period of his examination. *Jacobs v. Laybourn*, 1 Dowl. & L. 352, Ex.

An attorney, who has acted as advocate in the Sheriff's Court, cannot be heard as a witness in the same cause. *Stones v. Bacon*, 11 Jur. 44, Q. B. ; *S. C., Stones v. Byron*, 16 Law J., Q. B. 32.

*Form of writ of summons.]* The form of writ of summons given by the 2 Will. 4, c. 39, should be strictly followed. *Smith v. Crump*, 1 Dowl. 519.

And if the royal style is given, it should be correctly set out. *Hall v. Reddington*, 9 Law J., Ex. 100 ; 5 Mee. & W. 605.

Where the copy of writ of summons commenced, "William the

Fourth," instead of "Victoria," it was set aside with costs. *Drury v. Davenport*, 3 Mee. & W. 45; 6 Dowl. 162; 7 Law J., Ex. 49.

A writ of summons, dated on a Sunday, is a nullity, and the objection is not waived by lapse of time. *Hanson v. Shakelton*, 4 Dowl. 48, B.C.

A summons bearing date the day of the month is good, though the year is improperly described, or altogether omitted. *Solomon v. Nainby*, 7 Dowl. 459, Ex.

Where there are several defendants, the term "you" in the notice in the summons applies distributively. *Englehart v. Eyre*, 2 Dowl. 145.

The 17th section of the Uniformity of Process Act, as to attorneys declaring whether writs have been sued out in their names, applies both to serviceable and bailable process. *Gilson v. Carr*, 4 Dowl. 618.

*Description of plaintiff in a writ of summons.]* A writ of summons commanded the defendant to enter an appearance "at the suit of Henry Walker & Co.;" and that in default, &c., "the said Henry Walker & Co. may cause an appearance to be entered for you." It was indorsed "the plaintiff claims," &c.:—Held, that the writ was regular, as the court could not judicially take cognizance that "Walker & Co." was not the name which the plaintiff bore. *Walker & Co. v. Parkins*, 2 Dowl. & L. 982, Q. B.

*Writ of summons, description of defendant.]* Where a defendant was described in a writ of summons as "R. S., of the city of London:"—Held, that the description was insufficient, although it was stated in the affidavits that sometime before the issuing of the writ he had abandoned his house, and had no regular place of abode. Semble, that he ought to have been described as of his late abode. *Cotton v. Sawyer*, 10 Mee. & W. 328; 2 Dowl. N. S. 310.

It is not necessary to insert the addition of the defendant in the writ of summons. A defendant (an attorney) described in a writ of summons as of "Paper Buildings, Temple:"—Held, sufficient. *Morris v. Smith*, 4 Law J., Ex. 184; 2 C. M. & R. 120.

"Tufton Street in the county of Middlesex," is a sufficient description of a defendant's residence in a writ of summons. *Cooper v. Wheale*, 4 Dowl. 281.

*Indorsement of address of defendant on writ must be correct.]* A writ directed to "J. H., of W. Street, Finsbury, in the city of London," set aside upon affidavit that such address was in Middlesex, and not in the city of London. *King v. Hopkins*, 13 Mee. & W. 685; 2 Dowl. & L. 637.

*The supposed residence of defendant is sufficient in a writ.]* The description of the residence of the defendant in a writ of summons is sufficient if it be the supposed residence. *Windham v. Fenwick*, 11 Mee. & W. 102.

*Insufficient description of defendant's residence on writ of summons.]* Copy and service of the writ of summons set aside for insufficiency of the description of the defendant, as "of S., near Maidstone, in the

county of K., but to be heard of at P.'s Coffee-house, Fleet Street, in the city of London," it appearing that he lived at B. Street, Maidstone, and not at S., although constantly resorting to such coffee-house. *Simpson v. Ramsey*, 1 Dav. & Mer. 396; 5 Ad. & E., N. S. 371.

Where a writ of summons described the defendant as "Edmund Garbett, of Wellington, in the county of Salop, but now of Middlesex," such writ was held bad, for omitting to comply with the requisites of 2 Will. 4, c. 39, s. 1, which directs that in every writ of summons and copy thereof "the place and county of the residence or supposed residence of the party defendant, or wherein the party shall be, or shall be supposed to be, shall be mentioned." *Downes v. Garbett*, 2 Dowl. & L. 945; 14 Law J., Q. B. 216.

*Name of a party in writ must be certain.]* If a name on the face of the writ is naught or uncertain, the writ is bad, or containing no other description of the defendant than his surname, is irregular. *Margesson v. Tuggehe*, 5 Dowl. 9.

*Indorsement of defendant's address on writ.]* The Uniformity of Process Act requires that the place and county of the defendant's actual or supposed residence shall be correctly stated; but the court will not set aside the writ of summons, unless the defendant produces a positive affidavit that the residence has been misdescribed. *Lewis v. Newton*, 2 C. M. & R. 732; 1 T. & G. 72; 4 Dowl. 355.

*Indorsement of attorney's name on writ.]* Where the indorsement of the attorney's name on the copy of the writ of summons omitted the words, "who resides at" before the place of abode:—Held, sufficient. *Coppice v. Hunter*, 8 Dowl. 504, B. C.

A writ indorsed "M. & Co., agents for S.," without specifying the Christian names:—Held, sufficient. *Pickman v. Collis*, 3 Dowl. 429, Ex.

An indorsement of the attorney's residence, "Southampton Buildings":—Held, insufficient; but after the lapse of two months the objection too late. *Rust v. Chine*, 3 Dowl. 565, B. C.

And "Great James Street, Bedford Row," is insufficient. *Lloyd v. Jones*, 5 Dowl. 161, Ex.

A writ, indorsed with the name of the firm of the attorney, used in carrying on the business, satisfies the 12th section of the 2 Will. 4, c. 39, though only one of them is alive, and an attorney. *Hartley v. Rodenhurst*, 4 Dowl. 748, Ex.

Where a firm describe themselves on the back of a writ, as the agents for another attorney, stated to be the plaintiff's attorney, it is no objection that one of the firm appears in the declaration as the attorney. *Armstrong v. King*, 8 Dowl. 297.

A writ of summons was thus indorsed—"This writ was issued by G. F. & S., of No. 1, B. R., London, agents for Mr. J. T., of Exeter, in the county of D., the plaintiff within named":—Held, bad, inasmuch as it neither showed that the writ was issued by the attorney for the plaintiff, nor by plaintiff in person, as required by the 2 Will. 4, c. 39, s. 12. *Toby v. Hancock*, 1 B. C. Rep. 207; 10 Jur. 1083; 16 Law J., Q. B. 33.

Where the process was indorsed only with the name of the agent and not of the attorney immediately employed, the court held this irregular, and set aside the process. *Shephard v. Shum*, 2 C. & J. 632; 2 Tyrw. 742.

The form of the indorsement on the writ of summons in the schedule of the Uniformity of Process Act, No. 1, is, "This writ was issued by, &c., attorney for the said A. B.:"—Held, that a writ was not bad where the indorsement was "attorney for the said plaintiffs." *Hannah v. Wyman*, 4 Law J., Ex. 200; 2 C. M. & R. 239; 3 Dowl. 673.

The indorsement on the writ of the name of an attorney who is not on the roll of the Court of Exchequer is not such an irregularity as will entitle the defendant to a stay of proceedings in *toto*; but the court will direct the proceedings to be stayed until a proper attorney is appointed, on payment of costs by the attorney whose name is so indorsed. *Constable v. Johustoue*, 2 Law J., Ex. 25; 1 C. & M. 88; 3 Tyrw. 231.

*Description of the attorney's residence on a writ issued by him.]* The indorsement is sufficient, if the place of abode given be such as cannot mislead. Accordingly, a writ indorsed as having been sued out by "J. R., 10, Gray's Inn Square, Holborn, attorney for the plaintiff," was held good, though the county was not stated. *Youlton v. Hall*, 8 Law J., Ex. 147; 7 Dowl. 175.

In the indorsement on a writ of summons, the residence of attorney stated thus:—"No. 1, Clifford's Inn Passage, Fleet Street, in the city of London," without mentioning the parish, is sufficient. *Arden v. Garry*, 2 Scott, 186; and *Arden v. Jones*, 4 Dowl. 120.

"Gray's Inn, London," is a good description of an attorney's residence, under the provisions of 2 Will. 4, c. 39. s. 12. *Jelks v. Fry*, 3 Dowl. 37.

The omission of the word "London" in the indorsement on the copy of the writ:—Held, sufficient cause for setting aside the copy. *Smith v. Pennell*, 2 Dowl. 654, Ex.

*Indorsement of debt and costs on writ.]* The 2 Reg. Gen. H. T. 2 Will. 4, as to the indorsement on process of the amount of debt and costs demanded by plaintiff's is not directory, but compulsory. *Ryley v. Boissomas*, 1 Dowl. 383.

The court will not set aside process on account of the amount of the debt and costs not being indorsed upon it, according to the 2 Reg. Gen. H. T. 2 Will. 4, unless it appears on affidavit that the cause of action was a debt. *Curwin v. Moseley*, 1 Dowl. 432.

In an action on a bail bond or a replevin bond, it is not necessary to indorse the amount of debt and costs pursuant to 2 Reg. Gen. H. T. 2 Will. 4, and 5 Reg. Gen. M. T. 3 Will. 4. *Rowland v. Dakeyne*, 2 Dowl. 832.

"The plaintiff claims 20*l.* debt with interest from the 10th of March last" is sufficient. *Coppello v. Brown*, 1 C. M. & R. 575; 3 Dowl. 166; and *Sealy v. Hearne*, 3 Dowl. 196, B. C.

On a rule to show cause why the writ of summons should not be set aside for irregularity, on the ground that the amount of the debt and costs claimed by the plaintiff had not been indorsed on the writ:—Per

cur., No indorsement on the writ of the amount claimed is necessary where the claim is for damages as well as for a debt. *Perry v. Patchett*, 1 C. M. & R. 87.

The rule requiring indorsement of the amount of debt and costs on the writ:—Held, not to apply to an action of debt for penalties for bribery, under the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, s. 54. *Daries v. Lloyd*, 3 Mee. & W. 69; 6 Dowl. 173.

An indorsement on a writ of summons, “the plaintiff claims 95*l.* 8*s.* 6*d.* for debt, and £—— for costs,” is irregular. *Treslove v. Whitechurch*, 1 Scott, 415; 8 Dowl. 837.

The indorsement on the process was to pay the amount within four days from the “arrest hereon,” instead of “service hereof.” The court held this a fatal irregularity. *Cooper v. Waller*, 1 C. M. & R. 437; 3 Dowl. 167.

Where a writ was in trespass on the case and the indorsement for a debt:—Held, bad. *Richards v. Stuart*, 10 Bing. 319; 3 M. & Sc. 774; 3 Law J., C. P. 37.

Where a plaintiff, by his indorsement on the writ, claims a debt and interest, it is sufficient to state from what time he claims such interest without stating the rate at which he claims it. *Allen v. Bussey*, 1 B. C. Rep. 204.

A qui tam action of debt for penalties under 6 & 7 Will. 4, c. 66, is not within Reg. Gen. H. T. 2 Will. 4, r. 2, so as to require an indorsement of the amount of the debt on the writ of summons and copy thereof. *Hobbs v. Young*, 2 Dowl. & L. 474, Q. B.

*Indorsement on writ of sum claimed.*] The defendant having been served with a copy of a writ of summons, indorsed, “the plaintiff claims 150*l.* and interest thereon for debt, and 3*l.* 3*s.* for costs,” obtained a rule to show cause why the writ, copy, and service should not be set aside upon the ground that neither any specific sum for interest, nor the day from which it was claimed was stated:—Held, that the indorsement ought to have stated the day from which the interest was claimed, that the defect was an irregularity, and that the form of the rule was correct; and (it not being shown that the writ was regular) the rule was made absolute for setting aside the writ, copy, and service, with costs. *Chapman v. Becke*, 9 Jur. 1012, B. C.—Patteson, J.—15 Law J., Q. B. 5; 3 Dowl. & L. 350.

*Writ of summons, direction of, to defendant.*] Where a writ of summons was directed to the defendant, as of Newcastle-upon-Tyne, in the county of Northumberland, in which county it was served, instead of being directed, as it was alleged it should have been, to the defendant, of the town and county of the town of Newcastle-upon-Tyne:—Held, that as the 2 & 3 Will. 4, c. 64 (Division of Counties Act) had added the town and county of the town of Newcastle, and several other townships, to the southern division of the county of Northumberland, and as the defendant had not made it appear that he resided out of the added townships, the direction of the writ was right, and a judge’s order for setting it aside should be rescinded. *Rippon v. Dawson*, 7 Scott, 145; 8 Law J., C. P. 102; 7 Dowl. 247.

*Indorsement on writ of summons.]* The indorsement on a writ of summons, required by the Uniformity of Process Act, of the name of the attorney suing it out, must state for whom he is attorney. *Ward v. Loyd and another*, 10 Law J., Ex. 182.

*Indorsement on continuing writs.]* The indorsement on a second or subsequent writ of summons, issued under 2 Will. 4, c. 39, s. 10, to save the statute of limitations, must contain a memorandum, specifying the date, not only of the first writ, but of the return thereto. *Williams v. Williams*, 10 Mee. & W. 174.

*Altering writ after it is issued.]* Where a writ of summons which had originally been issued into one county was afterwards (without being resealed) altered by the substitution of another, the court set aside the proceedings on payment of the debt without costs, although the defendant had before taking the objection obtained a judge's order for staying the proceedings, on his undertaking to pay the debt and costs, which order had afterwards been made a rule of court. *Siggers v. Sansom*, 3 M. & Sc. 194.

*Amending mesne process.]* Since the Uniformity of Process Act gives a particular form of capias, the court will not allow it to be amended. *Colston v. Bernes*, 3 Dowl. 253, Ex.

Nor will the court allow the substitution of one cause of action for another. *Mills v. Gossett*, 1 Scott, 313, C. P.

The copy of a writ delivered to the defendant upon his arrest, when it varies from the writ itself, is not amendable. *Byfield v. Street*, 3 M. & Sc. 407 ; 10 Bing. 227 ; 2 Dowl. 739.

*Amendment of indorsement on writ.]* A judge at chambers cannot alter the amount indorsed on the writ of summons so as to bring the case under 20*l.* to give the sheriff jurisdiction. *Trotter v. Bass*, 1 Bing. 516 ; 3 Dowl. 407.

*Amendment of a writ of capias directed to the sheriffs of Middlesex.]* A writ of capias and copy being directed to the sheriffs of Middlesex a judge at chambers ordered both to be amended by striking out the letter *s*. The defendant obtained a rule nisi to set aside the said order and to cancel the bail bond :—Held, that the judge had not power to order the copy served to be amended and made the rule absolute to cancel the bail bond, costs to be paid by the plaintiff, but no action to be brought. *Moore v. Magan*, MS., Exch. M. T. 1846.

*Amendment of writ of summons.]* Errors in a writ of summons cannot be rectified after service, except when the action would be barred by the statute of limitations. *Lakin v. Watson*, 2 Dowl. 633, Ex. ; 4 Tyrw. 839 ; 2 C. & M. 685.

And not even then by adding the names of a co-plaintiff. *Ib.*

Where a writ of summons was by mistake dated the 4th of April, the praecipe being dated the 4th of May :—Held, that a judge had power to order an amendment of the writ, so as to make it correspond with the praecipe. *Kirk v. Dolby*, 6 Mee. & W. 636.

The omission of the word "on" before the word "promises," in describing the form of action in a writ of summons, is immaterial. *Cooper v. Wheale*, 4 Dowl. 281.

In the body of the copy of the writ of summons, the defendant was required to cause an appearance to be entered for him in "an action on the case, promises," the writ was set aside for irregularity. *Youlton v. Hall*, 4 Mee. & W. 582; 8 Law J., Ex. 147; 7 Dowl. 186.

*A writ of summons must contain the memorandum of its duration.]* A writ of summons is bad, and will be set aside for irregularity, if it does not contain the memorandum that it is to remain in force for four calendar months. *Patterson v. Busby*, 9 Law J., Ex. 16; 5 Mee. & W. 521; 7 Dowl. 868.

Where service of a writ of summons has not been effected until after the expiration of four calendar months from the date thereof including the day of the date, the proper course is for the defendant to apply to the court to set it aside, and not to treat the writ as a nullity. *Hamp v. Warren*, 12 Law J., Ex. 215.

*A writ must correctly describe the form of action.]* The writ was in trespass, but indorsed for a debt, and the declaration was in an action of trespass on the case on promises:—The court set aside the declaration and writ for irregularity, although no objection had been taken to the writ until the declaration had been filed. *Edwards v. Dignam*, 2 C. & M. 346; 2 Dowl. 240; and *Thompson v. Dicas*, 2 Dowl. 93; 3 Tyrw. 873.

"Libel" is a sufficient description of the form of action in a writ of summons. *Pell v. Jackson*, 2 Dowl. 455, C. P.

"An action of slander" is a sufficient description. *Davies v. Parker*, 2 Dowl. 537, B. C.

Where the writ described the action as "an action of trespass on the case on promises," the court set it aside for irregularity. *King v. Skeffington*, 1 Cr. & M. 363.

*Insufficient description of defendant and of defendant's residence.]* A writ of summons described the defendant as "Pilbow's Atmospheric Railway and Canal Propulsion Company, now or late carrying on business in King William Street, in the city of London." The company had been completely registered pursuant to the stat. 7 & 8 Vic. c. 110, and No. 6, King William Street, London, was registered as their place of business. They afterwards discharged their secretary and clerks, and gave up their place of business, but no other place of business was taken or registered by them, and there were no means of serving the writ but upon a director:—Held, that the description of the residence of the defendant was uncertain and insufficient under the stat. 2 Will. 4, c. 39, and also that the service of the writ upon a director, in the county of Middlesex, was bad, and that the person on whom it was served might avail himself of these grounds for setting it, and the service of it, aside. *Pilbow v. Pilbow's Atmospheric Railway and Canal Propulsion Company*, 16 Law J., C. P. 11.

*A writ cannot be altered after service.]* A plaintiff cannot alter his

writ after service; and a notice not to appear to the copy of the writ first served will not cure the defect. *Glenn v. Wilks*, 4 Dowl. 322.

*Altering a writ from assumpsit to debt not allowed.]* Where a writ had been sued out in assumpsit, the court refused to allow it to be altered into debt, to include a claim on a bond, there being nothing to bar a separate action on it. *Partridge v. Wallbank*, 1 Mee. & W. 316; 5 Law J., Ex. 167.

*Amendment of writs allowed to save statute of limitations.]* On a rule to amend the alias and pluries writs of summons and the indorsements thereon, by indorsing on the said writs memoranda of the date of the first writ of summons and of the return thereto, and to amend the record and proceedings in the cause accordingly; these amendments were proposed with the object of saving the statute of limitations:—Held, that the statute did not preclude the court from ordering the amendments and that the rule must be absolute on payment of costs. *Culverwell v. Nugee*, 15 Law J., Ex. 308.

The court will amend a writ of summons, although more than four months have elapsed since it was issued, by altering the cause of action from debt to assumpsit, on an affidavit that, if a fresh action were commenced, the statute of limitations would be a bar; but the court cannot amend the copy of the writ served, as they have no power over it. *Eccles v. Cole*, 8 Mee. & W. 537; 1 Dowl. N. S. 34; 10 Law J., Ex. 475.

The court allowed the plaintiffs, assignees of a bankrupt, to amend the writ of summons and subsequent proceedings, by adding the name of the official assignee as a plaintiff, in order to save the statute of limitations. *Brown v. Fullerton*, 13 Mee. & W. 556; 14 Law J., Ex. 79.

*Mistake in teste of copy of writ.]* A mistake in the year in the teste of the copy of a writ of summons, the writ itself being right, is a mere irregularity, which is waived if the defendant does not come to the court before the time for entering an appearance has elapsed. *Edwards v. Collins*, 5 Dowl. 227.

In the copy of a writ of summons, served upon the defendant, the teste was wrong, it being the 18th April, 1830, instead of 18th April, 1837. The indorsement on the copy was correct and so was the writ itself. Upon being served the defendant applied to the plaintiff, regretted the expense incurred, and offered to pay half the debt and costs:—Held, that such conduct on his part amounted to a waiver of the irregularity in the previous proceedings. *Briggs v. Burnard*, 6 Law J., C. P. 216.

*Re-sealing defective writ.]* If a defective writ is re-sealed, it ought to be dated of the day of re-sealing. *Knight v. Warren*, 7 Dowl. 663.

But where a writ had been sued out to prevent the statute of limitations from being a bar to the action, but on account of some alteration in the writ it was obliged to be re-sealed, and the re-sealing was after the time expired, the court held it to be sufficient, as the re-sealing

did not amount to a re-issuing of the writ. *Braithwaite v. Lord Montford*, 2 Cr. & M. 408.

*Amendment of writ of summons in the description of the parties.]* A judge at chambers upon a summons having ordered the amendment of the writ of summons, appearance, subsequent proceedings, &c., by describing the plaintiff's as assignees of certain bankrupts and the defendants as public registered officers, &c., upon motion to set aside the said order, the court held the amendment regular and refused a rule to show cause. *Christie and another v. Bell and another*, MS., Exch. E. T. 1847.

*Where several defendants reside in different counties, two writs of summons may issue.]* Where there are several defendants residing in two different counties, two writs of summons may be issued and dated on different days. *Crow v. Crow*, 13 Law J., Q. B. 57; 1 Dowl. & L. 709.

*Two writs of summons or capias may issue against several defendants.]* It is not irregular to issue two writs, either of summons or capias, against several defendants for the same cause of action, provided the writs be issued upon one praecipe, and bear date the same day. *Angus v. Coppard*, 3 Mee. & W. 57; 6 Dowl. 137; and *Angus v. Medwin*, 7 Law J., Ex. 10.

*Alias and pluries writs of summons to save statute of limitations.]* Alias and pluries writs of summons to be available to prevent the operation of the statute of limitations should be indorsed with a memorandum, not only specifying the date of the first writ, but also of its return. Where the indorsement on the alias and pluries was regular, with the exception that they did not contain the date of the return of the first writ, the court allowed the plaintiff to amend, even after the defendant had pleaded the statute of limitations, and issue was joined. *Mavor v. Spalding*, 13 Law J., Q. B. 185; 1 Dowl. & L. 878; and *Williams v. Williams*, 10 Mee. & W. 174.

Under the Uniformity of Process Act there is no limited time for issuing an alias or pluries writ, or for entering continuances, except where the original writ is to be made available to prevent the operation of the statute of limitations. *Nicholson v. Leman*, 3 Law J., Ex. 133; 2 Dowl. 296.

By the 2 Will. 4, c. 39, s. 10, where successive writs are sued out upon returns of non est inventus, to avoid the statute of limitations, such returns must be entered of record before the expiration of one calendar month after the return; but the court held it was not necessary that the first writ should be actually served, or that there should be any bona fide attempt to serve it. *Williams v. Roberts*, 1 C. M. & R. 676; 3 Dowl. 512.

*Continuance of writs.]* Writs of final process cannot, since the stats. 2 Will. 4, c. 39, and 3 & 4 Will. 4, c. 67, be continued by entries on the record, as under the old form, but they must be connected by being described as alias and pluries writs; and they need not be tested

on the return day of the former writ, or within any particular time afterwards.

A writ of mesne process, in continuation of a former writ, cannot be issued after twelve months from the issuing of such former writ. *Harmer v. Johnson*, 14 Mee. & W. 336; 14 Law J., Ex. 292.

In an action on a bill of exchange, dated in May, 1838, the original writ of summons into Middlesex was issued on the 15th August, 1844; on the 14th of January, 1845, it was returned non est inventus, and filed and entered of record; on the same day an alias writ of summons was issued into Middlesex; on the 10th June, 1845, a pluries writ of summons was issued into Surrey, and served the same day, and the defendant duly appeared to it; the plaintiff declared, and the defendant pleaded that the cause of action did not accrue within six years next before the commencement of the suit. The alias writ of summons was not in fact returned or entered of record till the 4th July, 1845. The Nisi Prius record was made up, stating only that the defendant was summoned to answer the plaintiff by virtue of a writ issued on the 15th day of August, 1844, and on its production at the trial the plaintiff obtained a verdict.

The court held, that the provisions of the statute 2 Will. 4, c. 39, s. 10, had not been complied with, and made absolute a rule to amend the Nisi Prius record by stating the continuances according to the truth, at the costs of the plaintiff.

Where a writ, issued within six years after the cause of action accrued, has not been duly continued, pursuant to the 2 Will. 4, c. 39, s. 10, the defendant is not bound to plead such continuance specially, but may take advantage of it under the general plea, that the cause of action did not accrue within six years next before the commencement of the suit; for this purpose, the last writ which is served is the commencement of the suit. *Pratt v. Hawkins*, 15 Mee. & W. 399.

*Irregularity in service of writ of summons, waiver of.]* An irregularity in the service of the writ of summons is waived where the defendant on being served with the notice of declaration says, "I am sorry I have not paid the debt, I will make arrangement to do so:"—Semble, that it is too late to move to set aside a copy of a writ of summons as irregular where an interval of sixteen days elapses between the service and the application, although the enlarged time for pleading has not expired. *Holt v. Ede*, 1 Dowl. & L. 68, C. P.

*Service of writ of summons—two calls only allowed.]* The costs of two calls only, for the purpose of serving a writ of summons are allowed on taxation. *Tapping v. Greenway*, 9 Mee. & W. 224; 1 Dowl., N. S. 408.

*Service of the writ of summons necessary, where defendant is arrested on a capias for bail.]* Where a defendant on his arrest under a judge's order deposited a sum of money in lieu of bail under the 7 & 8 Geo. 4, c. 71, and the writ of summons had expired, without service on the defendant, the court refused to allow the plaintiff to enter an appearance for the defendant. *Vizetelly v. Wickoff*, 2 Dowl. & L. 853, Ex.

*Service of writ of summons—entering appearance.]* The court will

not, in future, allow an appearance to be entered for a defendant unless there has been actual personal service of the writ; it will not be enough to show that the writ has come to the hands of the defendant. *Goggs v. Lord Huntingtower*, 12 Mee. & W. 503, and see Appearance, p. 20.

*Service of a writ on a public company.]* Where the provisions of a local act for a railway in Ireland enacted that the service of process should be upon the clerk or secretary, &c., or by leaving at the office of the company, with an inmate, or at the last usual place of abode of the secretary, &c., or if not known, by personal service upon any agent, or any director:—Held, that service personally on a director in England was null and void. *Evans v. Dublin and Drogheda Railway Company*, 14 Mee. & W. 142; 2 Dowl. & L. 865.

*Service of writ of summons on an agent, not allowed.]* Where an action is brought against a writer to the signet, resident in Edinburgh, as administrator, the court will not allow service of the writ of summons on the person resident in London, who has acted as agent in obtaining the defendant's letters of administration, to be good service. *Kerr v. Miller*, 8 Dowl. 322.

*Service of writ upon a wrong party, proceedings set aside, with costs.]* Where H., knowing he was served with a writ by a mistake, after three months' delay took steps preliminary to a judgment of non pros.:—Held, that the proceedings should be set aside with costs. *Richards v. Hanley*, 19 Jur. 1057, B. C.—Patteson, J.

*Service of writ, regular; writ irregular.]* An irregularity in the writ itself will not support a rule to set aside the service for irregularity, if the service was regular. *Hasker v. Jarmaine*, 2 Law J., Ex. 166; 1 C. & M. 408.

*Service of a writ in a wrong name, how cured.]* If a defendant who is served with process in a wrong name, appears by his right name, the irregularity is cured. *Bogue v. Milles*, 4 Doug. 180.

*Service of writ, motion to set aside, when to be made.]* A writ was served on the 25th October:—an application, on the 3rd of November, to set aside the service for irregularity (the 2nd being a Sunday) was held to be out of time, and that it should have been made on the 1st. *Tyler v. Green*, 3 Dowl. 439.

*Service of writ of summons, Easter intervening before appearance.]* The rule of Easter Term, 2 Will. 4, does not apply to entering an appearance; and therefore where the defendant was served on Monday, the 6th April, and Good Friday fell on the 10th, the plaintiff was allowed to enter an appearance on the 16th. *Harrison v. Roberts*, 10 Jur. 458, C. P.

*Service of writ may be set aside after appearance entered by plaintiff.]* Entering an appearance by a plaintiff for a defendant, pursuant to the statute, is not a step in the cause sufficient to prevent the latter from

applying to set aside an irregular service of the writ. *Davis v. Sherlock*, 7 Dowl. 530.

*Service of writ by letter insufficient for appearance.]* The plaintiff having, at the defendant's request, sent him by post a copy of a writ of summons, the receipt of which was not acknowledged until nearly a month afterwards, was held not to be entitled to enter an appearance for the defendant, without the indorsement of the day of service, as required by the Reg. Gen. M. T. 3 Will. 4, s. 3. *Atkinson v. Howelt*, 10 Law J., Ex. 64; 7 Mee. & W. 213.

*Service on the attorney conducting a cross-action, insufficient.]* Service of a writ of summons on the attorney of a defendant, who is prosecuting a cross-action, cannot be made good service, although the defendant may be keeping out of the way to avoid being served. *Parmerter v. Reed*, 7 Dowl. 545.

*To set aside copy and service of writ, the affidavit need not describe the deponent as defendant.]* It is not necessary that a party who has been served with a writ should state, in his affidavit to ground an application to set it aside, that he is the defendant in the cause. *Stevenson v. Thorne*, 13 Mee. & W. 149.

*Setting aside service of writ for irregularity.]* A motion to set aside the service of a writ of summons, on the ground of an irregularity in the indorsements thereon, and that it is directed to a different county from that into which the distressing is issued, must be made within a reasonable time after the service thereof:—Semble, that eighteen days is an unreasonable delay in this respect, provided the defendant might have come earlier. *Wright v. Warren*, 3 M. & Sc. 163.

If a copy of a writ is served in vacation, an objection to it for irregularity must be taken in vacation, if there is time for that purpose. *Hinton v. Stevens*, 4 Dowl. 283.

If a defendant seeks to set aside proceedings, on the ground of not having been served with process, it must appear by his affidavit that he is the defendant in the cause. *Johnson v. Smallwood*, 2 Dowl. 588.

*Service of writ under a local court act at the residence of defendant.]* An act of parliament establishing a local court enacted that mesne process might be served on the defendant either personally or by leaving the same at the dwelling-house, lodging, place of abode, &c. of the defendant:—Held, that it was sufficient to leave the process at a lodging-house where the wife of the defendant was living, though the defendant himself, a seafaring man, was absent on a voyage, and had been so for six months. *Culverson v. Milton*, 2 M. & R. 200.

*Writ, copy and service of, set aside, for omitting the name of court.]* Where the court was omitted to be mentioned in the copy of the writ, although tested in the name of the Lord Chief Baron, the copy and service set aside; and being the party served, it was no objection that in his affidavit his residence was differently described from that in the writ. *Stevenson v. Thorne*, 13 Mee. & W. 149; 2 Dowl. & L. 230; 8 Jur. 518.

*Service of writ of summons in a wrong county, accepted by defendant.]* Where a writ of summons was served in county A. instead of county B., the defendant's office being in the former county, but his dwelling-house in the latter (and which was the residence stated in the writ), and upon such service the defendant thanked the attorney's clerk for calling upon him at his office instead of his dwelling-house, and said that he would attend to it:—Held, that such service was regular. *Rumball v. Unit*, 10 Jur. 415, C. P.

*Writ served in wrong county.]* A party seeking to set aside the service of a writ of summons, on the ground of its having been served in the wrong county, must state positively that the place of service is not within the county into which the writ is issued, or within the prescribed distance from the boundary thereof; and it is not sufficient to state that he has been informed and believes that the place of service is more than half a mile from the county into which the writ issued. *Harrison v. Wray*, 11 Mee. & W. 815; 1 Dowl. & L. 366.

*Writ served in wrong county, service set aside.]* Upon a motion to set aside the service of process served in a wrong county, the affidavit stating it to have been more than 200 yards from the boundaries, held sufficient, without going on to allege that there was no dispute as to them. *Martin v. Granger*, 2 Dowl. & L. 268; 8 Scott, N. S. 367.

An affidavit to support a rule to set aside the service of process for irregularity, for service in a wrong county, must negative a service on the confines of the proper county. *Coulson v. King*, 1 Law J., Ex. 149; 2 C. & J. 474.

The court set aside the service of a writ of summons, defendant being described therein as “of Bristol, in the county of Gloucester,” and the service having taken place in the city of Bristol, in a place not within the county of Gloucester, or within two hundred yards of the boundary. *Levi v. Perratt*, 2 C. B. 345; 15 Law J., C. P. 4.

*Setting aside service copy and service of writ.]* An application to set aside “the copy of a writ of summons served on the defendant,” is nugatory. The application should be to set aside the service, or the copy and service. *Hall v. Redington*, 5 Mee. & W. 605; 9 Law J., Ex. 100.

To set aside the service of a writ of summons the application must be made within the eight days limited for the defendant's appearance. *Child v. Marsh*, 3 Mee. & W. 433; 7 Law J., Ex. 197; 6 Dowl. 576; and *Davis v. Sherlock*, 7 Dowl. 530.

Where there is an irregularity in the copy of a writ of summons served, the motion should be to set aside the copy and service, or the service, and not to set aside the copy served. *Crow v. Field*, 8 Dowl. 231, Ex.

If the service of a writ of summons is irregular, a rule to set aside both service and copy of the writ does require too much. *Argent v. Reynolds*, 6 Dowl. 480, B. C.

*A defective writ cannot be treated as a nullity by plaintiff.]* A plaintiff cannot lodge a detainer against a defendant, and then having, on

the ground of a defect in the writ, treated it as a nullity, lodge a second detainer against him. *Gaddeker v. Sheppard*, 4 Dowl. 577.

*Writ not personally served—motion to set aside proceedings.]* On an application to set aside proceedings, it being sworn that there had been no personal service on the defendant of any copy of the process, the court held this insufficient, for not going on to swear that it did not come to his possession or knowledge. *Phillips v. Ensell*, 1 C. M. & R. 374; 4 Tyrw. 812; 3 Law J., Ex. 338.

If it be left in doubt by the affidavits on both sides, whether there was a sufficient service or not, the court will not interfere. *Morris v. Coles*, 2 Dowl. 79, Ex.

*Setting aside either the writ or service for irregularity.]* Where there is an irregularity in the service of a writ of summons, the defendant may apply for a rule in the alternative to set aside either the writ or the service. *Dawson v. Willis*, 6 Jur. 1068, Ex.

*Writ issued into a county palatine.]* A writ was directed to the chamberlain of the county palatine of Chester:—Held, that service was irregular without the intermediate step of procuring his mandate to the sheriff. *Earl of Shrewsbury v. Haycraft*, 6 Bing. 194.

*Payment of amount indorsed on writ—subsequent costs.]* The debt and costs indorsed on a writ of summons were received by a clerk of plaintiff's attorney, after the expiration of the four days:—Held, that the attorney, not having offered to return the money, was not entitled to go on with the action for the recovery of further costs. *Hodding v. Sturchfield*, 7 Man. & G. 957; 2 Dowl. & L. 596; 14 Law J., C. P. 33.

*Setting aside writ of summons for irregularity—appearance entered after notice of motion.]* Where the copy of the writ was served on the 6th, and on the 13th the plaintiff had notice of a motion to set it aside for irregularity, which was to be drawn up on the following morning, before which the plaintiff entered an appearance and filed his declaration:—Held, that he did so at his own peril after the notice, and that the defendant was entitled to object at any time before the expiration of the period for entering an appearance. *Tiling v. Hodgson*, 13 Mee. & W. 638; 2 Dowl. & L. 655; 14 Law J., Ex. 115.

*Writ of capias—description of defendant.]* Where the defendant was described in a writ of capias, issued under 1 & 2 Vic. c. 110, s. 3, as "Mortlock," and in the copy served upon him as "Mortlake," the Court of Queen's Bench refused to discharge him out of custody on the ground of variance. *Macdonald v. Mortlock*, 2 Dowl. & L. 963; 14 Law J., Q. B. 244, B. C.—Coleridge, J.

A defendant whose name was Cocken, was arrested on a capias against him by the name of Cocker; he gave a bail-bond to the sheriff in the name of Cocken, sued as Cocker: and the bail-bond being afterwards assigned to the plaintiff, he declared thereon against the defendant as Cocken, sued by the name of Cocker. The defend-

ant pleaded that no such writ as that stated in the declaration was issued against him. It was admitted that he was the real defendant. The plaintiff was nonsuited; but the court set aside the nonsuit, and ordered a verdict to be entered for the plaintiff, because in point of fact there was a writ against the defendant by the name of Cocker. *Finch v. Cochen*, 3 Dowl. 678, Ex.

*Writ of capias—description of defendant's residence.]* Where no residence of the defendant is stated in the writ of capias, it is void, even though the plaintiff is not acquainted with it. *Ward v. Watts*, 5 Law J., Ex. 169; 5 Dowl. 94.

In a writ of ca. sa. if the place of the defendant's abode cannot be discovered, he may be described of his last place of abode. *Bettyes v. Thompson*, 7 Dowl. 322.

The description of the defendant in a capias was as of a place in a county, without stating the number of the house or parish. The court held this sufficient. *Webb v. Lawrence*, 1 C. & M. 806; 3 Tyrw. 906; 2 Dowl. 81.

Upon a motion to set aside the copy of a capias, on the ground of its not mentioning any county in the description of the defendant, the court were equally divided.—Tindal, C. J., and Gaselee, J., holding it unnecessary; contra Vaughan and Bosanquet, JJ. *Border v. Levi*, 1 Bing. N. S. 362; 1 Scott, 270; 3 Dowl. 150.

The omission of the defendant's residence on a writ of capias is fatal. *Price v. Huxley*, 2 C. & M. 211; 2 Dowl. 231.

A place at which it is expected he may be found is sufficient. *Welsh v. Langford*. 3 Dowl. 498.

Where the description of the defendant in a capias was as "late of, &c." where it appeared no other residence or means of description were known:—Held, sufficient. *Hill v. Harvey*, 2 C. M. & R. 307; 4 Dowl. 163.

A plaintiff is authorised, where the defendant's place of residence is unknown, to treat the place mentioned in the promissory note on which the action is brought as the supposed residence of the defendant. *Norman v. Winter*, 5 Bing. N. S. 279; 6 Scott, 378; 7 Dowl. 304.

The plaintiff may give the best description he can of the place where the defendant is to be found. A variance between the description of the defendant's residence in the affidavit of debt and the capias is immaterial. *Buffle v. Jackson*, 2 Dowl. 505, B. C.

The blank after the word "of," in the form of the writ of capias, given in the schedule to the 2 Will. 4, c. 39, must be filled up with the place of the residence or supposed residence, or where the defendant is or is supposed to be. A writ which directed the sheriff to take J. S., a clerk in the Army Pay Office, Somerset House, in the city of Westminster, and county of Middlesex, the court held to be bad. *Rolfe v. Swann*, 1 M. & W. 305.

A pluries writ of capias issued after a capias and alias, on which the party was arrested. The court held it irregular for not stating the place of residence, although stated in the previous writs. *Roberts v. Wedderburne*, 1 Bing. N. S. 4; 4 M. & Sc. 488.

*Concurrent writs of capias may issue.]* The rule M. T. 3 Will. 4, does not prohibit concurrent writs into different counties. *Davies v. Harding*, 10 Bing. 552; 4 M. & Sc. 450.

Two original writs of capias may issue on the same affidavit of debt into different counties. *Rodwell v. Chapman*, 2 Law J., Ex. 4; 1 C. & M. 70.

Neither 2 Will. 4, c. 39, nor the rules 6 and 7 Michaelmas term, 3 Will. 4, prohibit the issuing of concurrent original writs into different counties. Where, therefore, a plaintiff issued a capias into the county of M., and during the currency of that writ issued another, founded on the same affidavit of debt, into the county of D.:—Held, that such second writ was regular and valid. The second writ is, in such a case, to be considered as an original; and a judge's order treating it as an alias would be set aside. *Dunn v. Harding*, 3 Law J., C. P. 186; 10 Bing. 553; 4 M. & Sc. 450.

*Service of copy of writ of capias.]* It is not a sufficient compliance with section 4 of the Uniformity of Process Act, as to delivering a copy of the capias to the defendant, to deliver it at seven o'clock in the evening, when the arrest took place at nine o'clock in the morning. *Shearman v. McKnight*, 5 Dowl. 572.

Where a defective copy of the process is served on the defendant he is not bound to show that a similar defective copy was delivered to the sheriff; and unless an answer is given by the plaintiff, the defendant will be discharged out of custody. *Hodd v. Langridge*, 5 Dowl. 721.

*Indorsement of the sum on writ of capias must accord with affidavit.]* Where the writ of capias is indorsed for a larger sum than is contained in the affidavit, it is irregular, and an arrest under it will be set aside, according to the practice on 12 Geo. 1, c. 29, which is not in this respect affected by the 2 Will. 4, c. 39. *Cook v. Cooper*, 7 Ad. & E. 605; 7 Law J., Q. B. 16; 2 N. & P. 607.

*Indorsement on ca. sa.]* Where, on a judgment in debt for 312*l.*, the penalty of a bond to secure 156*l.*, a writ of ca. sa. was sued out, indorsed "to satisfy 188*l.* 9*s.*, and farther interest, from the 31st January then instant on 156*l.*, until paid:" the court refused to set aside the writ as uncertain or too large. *Williams v. Waring*, 4 Law J., Ex. 242; 2 C. M. & R. 354.

The substitution of the word "execution" for "service," in an indorsement on the copy of the writ of capias delivered to the defendant, under Rule 11, H. T., 2 Will. 4, is no ground for delivering up the bail bond to be cancelled, but an amendment will be allowed on payment of costs. *Shirley v. Jacobs*, 4 Law J., C. P. 61; 1 Scott, 67.

In the indorsement pursuant to 2 Reg. Gen. H. T., 3 Will. 4, if "execution" is substituted for "service," it is an irregularity, but which may be amended on terms. *Urquhart v. Dick*, 3 Dowl. 17.

*Indorsement on writ of ca. sa., of the expenses of a previous fi. fa. irregular.]* An execution plaintiff is not entitled to include in the sum indorsed, to be satisfied under a writ of capias ad satisfaciendum, the expenses of a writ of fieri facias, and a levy under it, but which writ

was ultimately unproductive. *Earp v. Satchell and another*, 12 Law J., Q. B. 122.

*Indorsement on writ of ca. sa.—interest.]* Section 17 of 1 & 2 Vic. c. 110, gives interest upon judgment debts until they are satisfied; and therefore a ca. sa. may be directed to levy the costs incurred in an action, and also "interest thereon at 4l. per cent." An indorsement to levy the sum mentioned in the writ "besides sheriff's poundage, officer's fees, &c." is wrong, but does not vitiate the writ. *Pitcher v. Roberts*, 12 Law J., Q. B. 178.

*Indorsement on writ of ca. sa.—application to discharge defendant.]* The court will not discharge a defendant out of custody on a testatum ca. sa. on the ground of the want of an indorsement on the ca. sa., pursuant to the rule of H. T. 2 & 3 Geo. 4. *Davidson v. Dunne*, 4 Dowl. 119.

After the lapse of two terms, the court will not discharge a defendant out of custody on the ground that his addition and place of abode are not indorsed upon the writ of ca. sa. *Constable v. Fothergill*, 2 Dowl. 591.

*Direction of writ to the sheriff.]* If a writ of capias be directed to the Sheriffs of London, the subsequent insertion of the word "sheriff" (in the singular) will not vitiate it. *Irving v. Heaton*, 4 Dowl. 638; 2 Scott, 798.

But a writ of capias directed to the Sheriffs of Middlesex is irregular. *Jackson v. Jackson*, 3 Dowl. 182; 5 Tyrw. 136, Ex.

A writ directed to the Sheriff of London is good, as the two sheriffs are but one officer. *Clutterbuck v. Wiseman*, 1 Law J., Ex. 81; 2 C. & J. 213; 2 Tyrw. 276.

A writ of capias directed to the "sheriffs," instead of the Sheriff of Middlesex, omitting the words "indorsed thereon":—Held, bad. *Barker v. Weedon*, 3 Law J., Ex., 341; 1 C. M. & R. 396; 4 Tyrw. 860.

The writ of capias was directed to the "Sheriff of Middlesex," and the copy delivered to the defendant was to the "Sheriff of Middlesex." The court discharged the defendant out of custody upon his entering a common appearance. *Hodgkinson v. Hodgkinson*, 3 Law J., K. B. 167; 1 Ad. & E. 533.

In a subsequent case it was held that the above case could not be supported. *Colston v. Berend*, 4 Law J., Ex. 54; 1 C. M. & R. 833.

*Variance in writ of capias and copy.]* The writ of capias itself was against Angel Boxeius. The copy of the capias called the defendant Angel Boxeius, and afterwards referred to him as the said "Angel Boxein":—Held, sufficient. *Levy v. Boxeius*, 4 Law J., K. B. 69.

Where a copy of a capias directed the sheriff to take the body of the defendant, "if he should be found in his bailiwick":—It was held, that there was no fatal defect. *Sutton v. Burgess*, 4 Law J., Ex. 109; 1 C. M. & R. 770.

Omission of the words "the" and "by" in the copy of the writ of capias served on the defendant, in that part which requires the sheriff

to return the writ immediately after ; or if unexecuted at the expiration of four months, &c., or sooner if required " by order of the court, or by any judge thereof :"—Not such a variance as will entitle the defendant to be discharged out of custody on entering a common appearance. *Pocock v. Mason*, 4 Law J., C. P. 60; 1 Bing. N. S. 245.

The omission of immaterial particulars in the writ of capias is not an irregularity of which the court will take notice, if the omissions do not alter the meaning of the writ. *Forbes v. Mason*, 3 Dowl. 104.

*Writ of capias may issue into a different county than where defendant is described of.]* A writ of capias may be issued into a county different from that in which the writ itself describes the defendant as resident ; and proceedings to outlawry, founded on such a writ, are regular. *Morris v. Davies*, 4 Dowl. 317.

*An alias writ of capias.]* The capias need not be returned previously to issuing the alias writ. *Gregory v. Des Anges*, 3 Bing. N. S. 85; 3 Scott, 534; 5 Dowl. 193.

*Amendment of writ of capias.]* A judge made an order for the arrest of the defendant for 422*l.* The capias was indorsed for 422*l.* 13*s.* 4*d.* (the real amount of the debt). The court refused to discharge the defendant out of custody, and directed the writ to be amended, on payment, by the plaintiff, of the costs of the application for the defendant's discharge. *Plock v. Pacheco*, 9 Mee. & W. 342.

*Amendment of ca. sa. in the description of the judgment.]* A writ of ca. sa. erroneously described the judgment as in assumpsit instead of debt. The defendant had obtained a summons to set aside the warrant of attorney on which the judgment was founded, which was dismissed, but no objection was then taken to the writ. After a lapse of more than a year from the date of the writ (no sci. fa. having been obtained), the defendant having moved to set aside the writ, and the plaintiff to have it amended :—Held, that it was amendable. *Bicknell v. Wetherell*, 10 Law J., Q. B. 345; 6 Jur. 366.

*Amendment of ca. sa. in the amount of the judgment.]* Where the amount of the judgment was stated incorrectly in the body of a writ of ca. sa., but the indorsement was right, the court gave leave to amend it after the defendant had applied to set it aside. *Arnell v. Wetherby*, 1 C. M. & R. 831; 4 Law J., Ex. 123; 3 Dowl. 464.

*Amendment of writ of capias—discharge of defendant.]* A defendant having been arrested upon a capias directed to the sheriffs, instead of to the sheriff of Middlesex, applied to a judge for his discharge. The judge refused to discharge him, and, on the application of the plaintiff, made an order for amending the writ and copy. The defendant, having applied to the court to rescind the judge's order :—Held, that the writ was properly amended ; that neither the court nor the judge had power to amend the copy ; and that the defendant was entitled to his discharge, on the ground of the variance between the writ as amended and the copy.

*Quære, whether the defendant could be again arrested upon the writ so amended by the judge. Moore v. Magan, 16 Law J., Ex. 57.*

*A second writ of ca. sa. may issue where the first was irregular.]* Where a party is discharged on the ground of the writ of ca. sa. being irregular, he may be taken again on a fresh writ. *Collins v. Beaumont, 2 P. & D. 363; and Marchant v. Frankis, 2 Gale & D. 473.*

*Duration of writ of ca. sa.]* A writ of ca. sa. may be executed more than a year after its date. *Greenshields v. Larris, 9 Mee. & W. 774.*

*The copy of a writ of capias must be dated.]* The copy of a writ of capias delivered to the officer is bad, if the date is omitted. *Smart v. Johnson, 3 Mee. & W. 69; 6 Dowl. 90; 7 Law J., Ex. 14; and Perrin v. Turner, 3 Dowl. 15, B. C.*

*The copy served of a writ of ca. sa. must accord with the original writ.]* The provisions of the stat. 2 Will. 4, c. 39, s. 4, apply to cases where a defendant is arrested under a judge's order, pursuant to stat. 1 & 2 Vic. c. 110, s. 3. Where, therefore, the copy of a ca. sa. issued under the latter act omitted to state the form of action mentioned in the original writ, the court set aside the service of the copy and cancelled the bail bond, although it properly recited the form of action. *Copley and another v. Medeiros, 2 Dowl. & L. 74; 8 Scott, N. S. 172; and Cook v. Vaughan, 4 Mee. & W. 69; 7 Law J., Ex. 219.*

*Concurrent writs.]* The plaintiff may issue concurrent writs of different forms, at one and the same time, provided only one be executed. *Smith v. Johnson, 2 C. M. & R. 350; 4 Dowl. 208.*

A fi. fa. and a ca. sa. cannot issue and be in force concurrently, where the fi. fa. has been executed. *Hodgkinson v. Whalley, 2 C. & J. 86; 2 Tyrw. 174; 1 Dowl. 298.*

*A writ of testatum ca. sa. may issue before the original ca. sa.]* The venue in the action being laid in Middlesex, the defendant was taken into custody upon a testatum ca. sa. issued into Yorkshire, before any original ca. sa. had issued into Middlesex.

An original writ of ca. sa. was afterwards issued into Middlesex, tested before the testatum ca. sa., but sealed afterwards:—Held, no ground for setting aside the testatum ca. sa. for irregularity. *Moss v. James, 1 Dowl. & L. 807, C. P.*

The omission of an original ca. sa. is no objection to a test. ca. sa. which has been issued without the former writ, although issued after an application is made to set aside the test. ca. sa. *Esdaile v. Davies, 6 Dowl. 465.*

*A testatum ca. sa. warranted by the original writ.]* Where, the venue being in Surrey, final judgment was signed on the 2nd April, 1840, and a testatum ca. sa. of the same date issued into Yorkshire, on which the defendant was arrested; an original ca. sa. into Surrey, also dated the 2nd April, 1840, with a general return non est inventus

thereon, was held sufficient to warrant the testatum. *Greenshields v. Harris*, 9 Mee. & W. 774; 2 Dowl. N. S. 272.

*Testatum ca. sa. after execution of fi. fa.—amendment.]* In an action where the venue was laid in Yorkshire, the defendant gave a cognovit, upon which judgment was subsequently signed in March, 1840. A writ of fi. fa. issued into Yorkshire, under which the debt and costs were only partly satisfied. On the 6th July, a ca. sa. for the residue issued to the sheriff of Middlesex. On the 31st August, a ca. sa. for the residue was also issued into Yorkshire, under which the defendant was arrested, but discharged from custody on the ground of privilege, on the 26th September following. On the 7th January, 1841, the defendant was again arrested, under the Middlesex writ issued in July, that writ was not a testatum writ. Upon a motion to discharge the defendant out of custody, on the arrest under the Middlesex writ, on the ground of irregularity:—Held, first, that that writ should have been a testatum writ, and was therefore irregular; and secondly, that it could not be amended, as it issued previously to the Yorkshire writ, from which the amendment was to be made. *Towers v. Newton*, 10 Law J., Q. B. 106.

*Concurrent writs of execution.]* Where the sheriff had withdrawn from possession, under a fi. fa., in consequence of the defendant's having informed him "that he had sold the goods to cheat the plaintiff":—Held, that he might take the defendant under a ca. sa. for the same debt, without previously returning the fi. fa. *Knight v. Coleby*, 5 Mee. & W. 274.

*Writ of execution, omission of date of judgment in.]* The court will refuse to set aside judgment for the omission of the date of judgment in the writ of execution. *Stephens v. Fitzgerald*, 11 Jur. 351.

*A writ of fi. fa. issued on the day the defendant died, irregular.]* Where a defendant died between eleven and twelve o'clock in the morning, and a writ of fi. fa. was sued out against his goods between two and three in the afternoon of the same day, the court set the writ aside as irregular. *Chick v. Smith*, 8 Dowl. 337.

*The mandatory part of a writ of fi. fa. must agree with the judgment.]* Where the writ commanded the sheriff, "that he cause to be made a certain debt of 269*l.*, parcel of a certain debt of 500*l.*, which J. C. lately recovered," &c.:—Held, an irregularity, for which the court set aside the writ with costs. *Cobbold v. Chilver*, 11 Law J., C. P. 173.

A summons, calling on the plaintiff to show cause why a writ of fi. fa., and all proceedings thereon, should not be set aside, on the ground of a variance between the amount mentioned in the mandatory part of the writ, and the amount for which judgment had been signed (according to the incipitur in the book of the clerk of the judgments), does not operate as a stay of proceedings; and therefore, the plaintiff having, before any order could be made upon such summons, entered and completed the judgment on the roll, in conformity with the writ of fi. fa., a judge's order, subsequently made to set aside the writ for

irregularity, was rescinded by the court. Semble, if the mode in which the judgment was completed was irregular, the defendant should have moved to set aside the judgment. *Phillips v. Birch*, 11 Law J., C. P. 297.

Although the time of entering judgment is the time of making the entry of the incipitur, yet the incipitur, strictly speaking, is only to be regarded as instructions for drawing up the judgment; and a variance between the sum then entered up and the sum in a writ founded on the judgment is immaterial, if the latter corresponds with the sum in the judgment roll.

Where, therefore, judgment was signed in the usual way, in debt, for the aggregate sum in all the counts, and a writ of *f. fa.* issued thereon for the real debt, the defendant, having obtained a summons to show cause why the writ should not be set aside for irregularity, on account of the variance, the plaintiff before the hearing having carried in the judgment roll, with a *remitititur* *damna* entered on it, for the difference between the aggregate sum and the real debt:—Held, that the writ could not be set aside for the alleged irregularity. *King v. Birch*, 11 Law J., Q. B., 183.

*A writ of ca. sa. having issued for damages, a second writ cannot issue for the costs.]* Where upon the trial of an action of trespass, the jury found a verdict for the plaintiff with 32*l.* damages, and the judge granted a certificate under 1 Will. 4, c. 7, s. 2, for speedy execution for the damages recovered, and the plaintiff having taxed his costs, issued a *ca. sa.* indorsed to levy the damages only and not the costs, on which the defendant was arrested; and having paid the amount of the damages, he was discharged:—Held, that the plaintiff, by such arrest for the damages only, was precluded from issuing a second writ for the costs; for that under the certificate both damages and costs might have been included in the writ; and that if by the certificate, the amount of the execution had been limited to a portion of the damages only, the plaintiff should have sued out a special writ, reciting the certificate, and directing the levy for the amount of such damages only. *Smith v. Dickenson*, 1 Dowl. & L. 155; 12 Law J., Q. B., 314.

*Variance of writ from affidavit to hold to bail.]* Where an affidavit of debt described the plaintiff as “W. B. the younger,” but in the writ the words “the younger” were omitted, his father bearing the same name and residing in the same town as himself:—Held, that the writ was bad, but the court allowed the plaintiff to amend it on payment of costs, on the ground that the plaintiff might suffer a detriment if the defendant were discharged out of custody, and it not being a mere question of costs. *Bilton v. Clapperton*, 9 Mee. & W. 473.

The affidavit in support of a writ described the plaintiff as “J. R. one of the public officers of the Western District Banking Company for Devon and Cornwall;” in the writ the words “for Devon and Cornwall” were omitted. The court discharged, without costs, a rule for discharging the defendant out of custody on the ground of the variance, upon the plaintiff’s filing a fresh affidavit, omitting those words in the title. *Richards v. Dispraire*, 9 Mee. & W. 459.

*Arrest under a ca. sa. in a wrong county, time to move for discharge.]* The court refused, after the lapse of a year, to discharge a party who had been arrested under a ca. sa. in a wrong county, although he swore that he was not aware of that fact until ten months after his arrest, and that he then applied immediately for his discharge to a judge, who refused to interfere. *Greenshield v. Pritchard*, 8 Mee. & W. 148.

*Error in copy of writ of capias delivered by the officer.]* The delivery by the officer of a copy of a writ of capias, under the statute 2 Will. 4, c. 39, wherein the process is described to have issued in the reign of Will. 4, and as being tested in the reign of Victoria, is a mere irregularity, and therefore, an application for setting such copy aside, and discharging the defendant out of custody, is too late, if made more than eight days after the arrest, unless the delay is satisfactorily accounted for. *Brashaw v. Russell*, 7 Law J., C. P. 18; 6 Dowl. 185; 5 Scott, 268.

*A ca. sa. may issue on judgment pending another process.]* The plaintiff having obtained final judgment in a cause in the Court of Exchequer, afterwards proceeded for the same cause of action, by foreign attachment in the Lord Mayor's Court in London, against the defendant's goods; the defendant surrendered himself into custody in discharge of the attachment; and on the following day, whilst he was so in custody, the plaintiff issued a ca. sa., under which the defendant was detained:—Held, that the ca. sa. was not irregular; and that, the plaintiff having abandoned his proceedings in the Lord Mayor's Court, and the defendant having in consequence obtained judgment of non pros. thereon, there was no ground for his discharge under the equitable jurisdiction of the court. *Chamberlayne v. Green*, 9 Mee. & W. 790.

*A second writ of fi. fa. cannot issue until the first has been returned.]* A fi. fa. having been issued, and a seizure made, it was agreed that the sheriff should withdraw from possession, on the defendant's paying a portion of the debt immediately, and the remainder by monthly instalments, and that in default of payment, the plaintiff should be at liberty to re-enter into possession. A part of the debt was paid; but failure having been made in payment of the first instalment, the plaintiff issued a second fi. fa. under which possession was taken without returning the first:—Held, that the first writ ought to have been returned, as a levy had been made under it, and that, therefore, the second fi. fa. was irregular. *Chapman, P. O. v. Bowlby*, 10 Law J., Ex. 299; 8 Mee. & W. 249.

*The sum indorsed on writ of fi. fa. must agree with the judgment.]* The sum for which a fi. fa. issues must agree with the sum recovered by the judgment; or if it does not, the variance must be explained on the writ. Thereforc, where in an action of debt, the sum recovered was 33,348*l.* 14*s.* and 10*l.* 13*s.* 8*d.* for costs, and the sheriff was directed to levy 3,348*l.* 15*s.* 8*d.*, the sum really due, and 10*l.* 13*s.* 8*d.* for costs, the court set aside the writ for irregularity. *Webber v. Hutchins*, 10 Law J., Ex. 354; 8 Mee. & W. 319.

*Amendment of writ of fi. fa.]* An irregular fi. fa. cannot be amended to the prejudice of the intervening rights of assignees. *Brooks v. Hodgson*, 7 Man. & G. 529.

*Sheriff's return to a writ of fi. fa.]* A sheriff's return to a writ of fieri facias must state the value of the goods. *Barton v. Gill*, 1 Dowl. & L. 593, Ex.

*Scire facias, teste of.]* A writ of scire facias cannot be tested in vacation, notwithstanding the provisions of sec. 12 of the Uniformity of Process Act. *Seaton v. Heap*, 5 Dow. 247.

*Service of scire facias where defendant keeps out of the way.]* Where a notice of scire facias was left with a person who represented herself to be the defendant's housekeeper, and who stated that the defendant was somewhere in London, and that she could not account for his absence except that he was avoiding legal process, the court granted a rule to sign judgment for non-appearance. *Dixon v. Thorold*, 10 Law J., Ex. 303 ; 8 Mee. & W. 297.

*Service of sci. fa., the defendant residing abroad.]* On a motion to issue a scire facias to revive a judgment more than fifteen years old, it appeared on affidavit that the defendant was residing in America. A letter had recently been received from him, and he was the owner of some houses in Liverpool. The court granted a rule to show cause in the next term, notice of the rule to be stuck up in the office, and to be served on the defendant's tenants in Liverpool. *Macdonald v. Maclarens*, 11 Mee. & W. 465.

*Scire facias—setting aside for irregularity.]* It is no ground for setting aside a writ of sci. fa. as irregular, that there has been no return to an alias fi. fa., issued on the same judgment, although something has been done under that writ, because this may be the subject of a plea to the sci. fa. *Holmes v. Newlands*, Dav. & M. 642 ; 5 Q. B., 634 ; 13 Law J., Q. B. 82.

*Scire facias on judgment seventeen years old, on affidavit of plaintiff's attorney.]* The court granted a rule nisi for a scire facias to revive a judgment seventeen years old, upon the affidavit of the plaintiff's present attorney, stating that the debt and costs were unpaid ; it appearing that the plaintiff's (executors) were infants, and unable to make any affidavit on the subject. *Smith v. Mee*, 13 Law J., C. P. 121.

*Notice of a scire facias may be served abroad.]* Where a defendant was resident abroad, at Boulogne in France, the court granted leave to sign judgment against him upon sci. fa., on an affidavit of service of notice of the writ upon him in that place. *Stockport v. Hawkins*, 1 Dow. & L. 204, Q. B.

*Pleading to scire facias.]* The defendant may obtain leave to plead several matters to a scire facias on a judgment. *Shaw v. Lord Alvanley*, 2 Bing. 325.

A plea to a scire facias of a writ of error pending is clearly bad. *Snook v. Mallock*, 5 Ad. & E. 279, K. B.

*Return to scire facias—judgment.]* After returns nihil to a scire facias judgment cannot be signed, unless efforts to serve be shown. *Sabine v. Field*, 1 C. & M. 466, Ex.

*Amendment of writ of scire facias by adding name of official assignee.]* Where the name of an official assignee had been omitted in a sci. fa., on a judgment confessed to the bankrupt, the court after plea pleaded gave the plaintiff's leave to amend by inserting his name. The leave was granted on payment of costs of the application; and it is the universal condition of leave to make such an amendment, that the defendant shall have leave to plead de novo. *Holland v. Phillips*, 10 Ad. & E. 149; 8 Law J., Q. B. 235; 2 P. & D. 336.

*Amendment of a Christian name in a writ of scire facias.]* The court allowed writs of scire facias, issued in a different Christian name from that stated in the judgment, to be amended, by altering it to the one stated in the judgment, although the ca. sa. had been executed and returned. *Thorpe v. Hook*, 1 Dowl. 501, B. C.

*Scire facias against personal representative.]* Upon a return of "nihil" to writ of scire facias against personal representatives, a sci. fa. may be sued out against the heir and terre-tenant without a rule to show cause. *Wright v. Maddox*, 10 Jur. 266, Q. B.

*Writ of scire facias against a member of a company, pleading to.]* In a declaration in scire facias against a member of a company formed under letters patent, granted under the provisions of 1 Vic. c. 73, it is not necessary to aver whether, or to what extent, the defendant's liability is limited in such letters patent, according to the power given by the 24th section of the act, it being matter to be shown by the defendant's plea. Neither is it necessary to show in the declaration that the defendant was a member at the time the cause of action accrued; it is enough (where the original action was assumpsit) to state that he was a member at the time the promise was made.

A plea that the defendant at the commencement of the suit was not liable as an existing or former member of the company is a bad plea.

A plea, setting out matters showing that the company, in its formation, did not comply with the directions contained in the fifth section of the act, is a bad plea, as such matters might have been pleaded to the original action.

A plea, setting out the judgment in the original action, which was against the registered officer of the company, on a bill of exchange drawn and indorsed by A. D. B. as agent of the company, and asserting that A. D. B. did not, as agent of the defendant, or by his authority, make or indorse the said bill of exchange, is bad for the same reason.

A plea, that the original action was brought against the registered officer for a demand, on which neither he nor the defendant, nor the company, were by law liable, and that such registered officer and the

plaintiff well knowing the premises, the registered officer fraudulently, and by connivance with the plaintiff suffered judgment by default, in order and with intent that the plaintiff might sue for and recover the amount against the defendant, is a good plea. *Phillipson, P. O. v. Earl of Egremont*, 14 Law J., Q. B. 25.

*Scire facias against ter-tenants.]* The rule Hilary term, 2 Will. 4, s. 79, does not apply to a scire facias against the ter-tenants, which can only be founded on a previous scire facias against the personal representatives; and a rule nisi is, therefore, unnecessary, though the judgment is more than fifteen years old. *Wright v. Maddox*, 15 Law J., Q. B. 81.

*Motion to quash a writ of scire facias.]* The rule for quashing a scire facias on the application of the plaintiff after appearance and before plea is nisi in the first instance, although on the terms of paying costs. *Ade v. Stubbs*, 4 Dowl. 282.

*A scire facias not necessary if ca. sa. has issued within a year.]* A defendant may be taken in execution after the expiration of a year from the judgment, upon a ca. sa. sued out within the year, although not returned and filed within the year; and no scire facias is necessary in such case. *Simpson v. Heath*, 5 Mee. & W. 631.

*A scire facias is not necessary where final process had been issued, though not returned.]* If final process, which is now returnable upon execution, be duly issued within a year and a day of the time of signing final judgment, and remain in the hands of the sheriff unexecuted, fresh process may be issued at any time afterwards, without previously returning the first, or suing out a sci. fa.

Where, therefore, final judgment was signed in June, 1843, and a ca. sa. forthwith issued against the two defendants, one of whom was arrested, and discharged under the Insolvent Act, whilst the writ remained unexecuted against the other:—Held, that a writ of fi. fa. was regularly issued in 1846, against such other defendant, although no scire facias was previously issued, nor any return made to the writ of ca. sa. *Franklin v. Hodgkinson*, 10 Jur. 249, Williams, J.; 15 Law J., Q. B. 132.

*Signing judgment on scire facias.]* The court will permit judgment to be signed on a scire facias after eight days from the return, where the defendant resides abroad, he having had reasonable notice of the proceedings. *Weatherhead v. Landles*, 5 Dowl. 189; 3 Scott, 406.

*Writ of venditioni exponas—order to return.]* The writ of venditioni exponas is a branch of the writ of fieri facias, not a distinct process; and therefore, a judge has power in vacation, under 2 Will. 4, c. 39, s. 15, to order the sheriff to return such writ, and an attachment may be obtained for disobedience to such order, pursuant to the rule of M. T., 3 Will. 4, s. 13. *Hughes v. Rees*, 4 Mee. & W. 468.

*Writ of inquiry in debt, not necessary.]* An inquiry is not essential in debt, unless it appear clearly that the amount must, from the nature of the contract, be uncertain. *Weald v. Brown*, 2 C. & J. 672.

*Writ of inquiry, when necessary.]* Where a plaintiff has obtained a judgment non obstante veredicto, he may execute a writ of inquiry without leave of the court. *Shephard v. Halls*, 2 Dowl. 453.

Where a defendant has suffered judgment by default, in an action for calls on shares in a railway company, on which interest is also claimed, pursuant to the provisions of the act of parliament, the court will not grant a rule to compute, but will direct a writ of inquiry to be executed. *Cheltenham and Great Western Railway v. Fry*, 7 Dowl. 616, B. C.

*Writ of accedas ad curiam.]* This writ does not lie from a court of requests to the superior courts at Westminster. *Bates v. Turner*, 10 Moore, 32.

*Writ of elegit—sheriff's return.]* The sheriff's return to an elegit stated the debtor to be seised in fee "of and in a dwelling-house and farm, with the appurtenances, commonly called or known by the name of Pen-y-rorsedd, containing, by estimation, nineteen acres, situate," &c. In ejectment, by the elegit creditor, it appeared that the farm was called indifferently by the names of Pen-y-rorsedd and Rhos farm, and was in extent about thirty acres, having upon it a farm-house and two cottages:—Held, that the return was sufficient to entitle the lessor of the plaintiff to recover the whole. *Doe d. Roberts v. Parry*, 13 Mee. & W. 356; 2 Dowl. & L. 430.

*Writ of habeas corpus to charge plaintiff in custody with costs of nonsuit.]* A writ of habeas corpus lies to bring up a plaintiff already in custody, or order to charge him in execution for costs of a nonsuit: No affidavit necessary. *Furnival v. Stringer*, 5 Dowl. 195, C. P.

*Writ of habeas corpus, costs of opposing discharge under.]* Where a party, being in custody for contempt for not putting in an answer to a bill in equity, applied to the court for a writ of habeas corpus ad subjiciendum, and the court granted the writ, and directed notice thereof to be given to the plaintiff in the cause, who, upon the return of the writ, opposed the prisoner's discharge, and he was remanded to his former custody:—Held, that the court had no authority to give the plaintiff costs. *In re Cobbett*, 14 Mee. & W. 175.

*Writ of subpoena duces tecum, date of.]* A writ of subpoena duces tecum, bearing date out of term:—Held, void; being a judicial proceeding, it must be issued whilst the court is sitting. *Edgell v. Curling*, 2 Dowl. & L. 600.

*Writ directed to the coroner.]* Where a writ is directed to the coroner, it need not appear that the sheriff is a party. *Bastard v. Trutch*, 3 Ad. & E. 451; 4 Dowl. 6.

## WRIT OF TRIAL.

*Actions triable under writs of trial.]* An action of assumpsit for not returning goods let to hire by the plaintiff to the defendant, in which the damages laid in the declaration are under 20*l.*, is not within the writ of trial clause (s. 17) in the 3 & 4 Will. 4, c. 42. And where such an action had been tried before the under-sheriff, the court set aside the writ of trial and the subsequent proceedings. *Collis v. Groom*, 3 M. & G. 850; 4 Scott, N. R. 574.

Detinue, where the article sought to be recovered is stated to be of the value of 20*l.*, may be tried before the sheriff under 3 & 4 Will. 4, c. 42, s. 17. *Walker v. Needham*, 3 Man. & G. 557; 4 Scott, N. R. 222.

In order to raise the question whether a case is triable before the sheriff, the proper motion is not for a new trial, but to set aside the writ of trial and the proceedings thereon. *Ib.*

*Indebitatus assumpsit, if not for unliquidated damages, may be tried before a sheriff.]* In an action of indebitatus assumpsit, for arrears of salary due to plaintiff as chorus master at a theatre, and for salary due to plaintiff for his services as a performer at the same theatre, and on an account stated; it appeared, that the action was brought for arrears of salary, from which defendant claimed to make certain deductions, (the plaintiff denying his right to do so,) and for a week's salary, consequent on a dismissal without a week's notice, and for certain performances as an actor in certain parts undertaken at a short notice, and respecting which there was no agreement as to the rate of remuneration. The particulars of demand claimed a sum of 19*l.* 18*s.* 6*d.*, and consisted of various items of the description above-mentioned, but contained no claim for unliquidated damages:—Held, that this was not an action for unliquidated damages, and therefore might be tried before the sheriff, pursuant to the 3 & 4 Will. 4, c. 42, s. 17. *Hatton v. Macready*, 2 Dowl. & L. 5, Q. B.

*Requisites in the form of a writ of trial.]* An action was entered to be tried before the sheriff, in which two issues were joined. The plaintiff delivered the issue in the form required by Reg. Gen. H. T. 4 Will. 4, but omitted the teste of the writ of trial, as well as the day of its return. The issue also stated the writ as commanding the sheriff to summon the jury to try the issue instead of the issues. A rule nisi having been obtained in term, “to set aside the issue and notice of trial, or why the issue should not be amended at the plaintiff's costs:”—Held, first, that there was an irregularity in the issue for omitting to state the dates.

Held, secondly, that it was also irregular in commanding the sheriff to summon the jury to try the issue instead of the issues; that such irregularity must be amended at the plaintiff's costs, but that the notice of trial might be allowed to stand good.

Held, thirdly, that the defendant was at liberty to make this application to the court, and was not compelled to make it at chambers in term time. *Dennett v. Hardy*, 2 Dowl. & L. 484; 14 Law J., Q. B. 12; 9 Jur. 135, B. C.—Patteson, J.

Where there are several issues joined in a cause, and a writ of trial directs a jury to be summoned to try "the issue," this is an irregularity which is waived by the defendant's appearance at the trial. *Towers v. Turner*, 15 Law J., C. P. 249.

An under-sheriff cannot amend the record by substituting the word "issues" for "issue" in the writ of trial. *Alexander v. Roland*, 11 Jur. 44, Q. B.

*Writ of trial cannot issue if the sum indorsed exceed 20l. although the particulars claim less.]* A writ of trial cannot issue under 3 & 4 Will. 4, c. 42, s. 17, where the sum indorsed on the writ exceeds 20l., although a sum less than 20l. is claimed by the particulars. And the court will not amend the writ, by reducing the sum indorsed to the amount mentioned in the particulars, but will set aside the writ. *Goslin v. Cotterell*, 14 Mee. & W. 71; 2 Dowl. & L. 893.

This case over-rules *Fordsham v. Round*, 4 Dowl. 569.

*Order for writ of trial, when to be applied for.]* A judge's order for a writ of trial ought to be obtained before the delivery of the issue. *Dennett v. Hardy*, 2 Dowl. & L. 484.

And the court will not interfere with the discretion of a judge at chambers as to granting or refusing a writ of trial. *Davies v. Lloyd*, 1 Tyrw. & G. 28; 4 Dowl. 478.

*Variance in the dates of the writ of trial and the issue.]* Where, on the trial of a cause under a writ of trial, it appeared that there was a variance between the dates in the writ of trial and in the issue, and such variance was amended by a judge's order after the trial, the court would not allow the defendant (who had proceeded in his defence after taking the objection at the trial) afterwards to object that such amendment could not be made, and that the proceedings were irregular. *Farwig v. Cockerton*, 3 Mee. & W. 169.

Where the issue delivered to the defendant omitted to mention the date of the writ of summons, and the writ of trial was found to contain such date:—Held, that such variance between the issue and the writ of trial was material; and that the latter and all proceedings upon it should be set aside. Held, also, that the plaintiff's attorney had no right to insert the date of the writ of summons, omitted in the issue in the writ of trial; but that, in case of mistake, he should have applied to a judge to amend the writ of trial. *Blissett v. Tenant*, 7 Law J., C. P. 108; 4 Bing. N. C. 168; 5 Scott, 479.

*Variances in dates of issue delivered and the writ of trial.]* A writ of trial was tested on the 14th of February, returnable on the 16th of January next. Notice of trial was given for the 16th of February, on which day the cause was made a remanet. The plaintiff then resealed the writ of trial, and inserted the 21st of February as the return day. The cause on that day was called on, and a verdict taken for the plaintiff; the defendant retiring from the court, and refusing to take any part in the proceedings. The issue delivered by the plaintiff did not correspond with the writ of trial, either in the date of the teste or return:—Held, that the above alteration and variances were simply irregularities, and that the defendant was bound to come

promptly, in order to take advantage of them. *Thomas v. Stannaway*, 2 Dowl. & L. 111, Q. B.

Or where the date of the writ of summons is wholly omitted. *Farwig v. Cockerton*, 6 Dowl. 337.

*Amendment of copy of issue of writ of trial.]* Where the copy of the issue, delivered to the defendant, was dated 1839, instead of 1840, and blanks were left for the date of the teste and return of the writ of trial, the writ itself and the roll being correct, the trial having taken place under protest, the court allowed an amendment on payment of costs. *Watts v. Ball*, 9 Law J., C. P. 282; 1 Scott, N. R. 173; 8 Dowl. 589.

*Writ of trial—informalities in issue.]* Where the date of the writ of summons, and the recital of the writ itself, were omitted in the issue, but the writ of trial was correct in these particulars, and the defendant at the trial protested against the irregularity, and refused to take any part in the proceedings; a rule afterwards obtained, to set aside the issue, and all subsequent proceedings was discharged with costs, on the ground that the defendant ought to have returned the issue when delivered, or applied before the trial to set it aside. *Cooze v. Neumegen*, 9 Mee. & W. 290.

*Objecting to a wrong summoning of the jury on writ of trial.]* After verdict in a cause tried before the sheriff under a writ of trial, the court will not entertain an objection which was not made at the trial, that the jury was wrongly summoned, and was composed of persons who were not on the jury list for the county. *Kingston v. Groom*, 11 Mee. & W. 826.

*Amendment of informalities in a writ of trial]* Where the issue and writ of trial were informal in the following respects:—1. That the date of the writ of summons did not appear in the writ of trial; 2. That the issue did not recite any writ of summons or award of venire; 3. That the award of venire, in the writ of trial, stated the debt to be above 20*l.*; 4. That the writ of trial bore no date; and 5. That it did not recite when and out of what court it issued: the defendant having appeared at the trial without objection, and a verdict having been found for the plaintiff, the court refused to set aside the proceedings, but directed that the writ of trial should be amended, the plaintiff paying the costs of the amendment and of the application to set aside the proceedings. *Emery v. Howard*, 9 Mee. & W. 108.

Where the errors objected to in the writ of trial, as the teste being in blank, and the writ returnable immediately, were amendable if applied for:—Held, that the defendant, by appearing at the trial without objection, had waived them. *Masters v. Davy*, 2 Dowl. N.S. 340.

*Making up the issue for writ of trial.]* In the issue the signature of counsel to the pleadings need not be inserted.

In an issue delivered under a judge's order for a trial before the sheriff, under the stat. 3 & 4 Will. 4, c. 42, the date of the teste of the writ of trial should be inserted, although the writ has not, in fact,

issued; but it is not necessary to state the day on which it will be returnable.

Where an issue omits to mention the date of the teste of the writ of trial, the proper course is for the defendant to apply to a judge to amend the issue at the cost of the plaintiff, and not to apply to the court to set aside the issue and notice of trial. *Jefferies v. Yablonski*, 15 Law J., C. P. 213.

The issue delivered, with notice of trial before the sheriff, need not contain the date of the venire:—Semble, per Tindal, C. J.—it need not contain the venire at all. *Wilson v. Nesbitt*, 11 Law J., C. P. 206.

The issue being left in blank, for the teste and return of the writ of trial, is a mere irregularity, objection to which must be taken promptly, and where eight days had elapsed pending negotiations:—Held, too late to take advantage of the defect. *Pearl v. Hughes*, 2 M. G. & S. 346.

*Notice of trial in inferior court.]* A notice of trial in an inferior court of record is insufficient unless it specify the day of trial. *Farmer v. Mountford*, 9 Mee. & W. 100.

*The sheriff has power to amend at a trial.]* The sheriff has power under the stat. 3 & 4 Will. 4, c. 12, to direct an amendment as well as a judge at Nisi Prius. *Hill v. Salt*, 2 C. & M. 420.

And if he does not exercise that power the court will direct a new trial. *Higgins v. Nichols*, 7 Dowl. 551.

*Amendment of the date of the writ of summons in the writ of trial.]* A misrecital of the date of the writ of summons in the writ of trial may be amended. *Percivall v. Connell*, 5 Scott, 91; 6 Dowl. 68.

*Amendment of writ of trial in return of the writ.]* If a cause be tried before the sheriff after the return of the writ of trial, the latter may be amended. *Sherman v. Tinsley*, 4 Scott, 286, C. P.

The contrary was held in *Mortimer v. Preedy*, 3 Mee. & W. 602. See p. 326.

*Postponement of trial before the sheriff.]* The sheriff has no power to put off the trial, the proper course is to apply to a judge. *Packham v. Newman*, 1 C. M. & R. 584; 3 Dowl. 165.

Where a trial before the sheriff does not take place on the appointed day, but on one subsequent, it is not necessary to have the writ of trial re-sealed unless the return day be passed before the trial. *Chandler v. Bezward*, 2 Mee. & W. 205; 6 Law J., Ex. 66; 5 Dowl. 311.

*Return of writ of trial.]* Where the writ of trial, issued on the 3rd of January, was made returnable on the first day of Easter term, and the trial was had on the 16th of January, and the verdict found for the defendant; the court, on the defendant's motion, ordered the sheriff to return the writ forthwith. *Billing v. Railton*, 2 Dowl. & L. 771.

*Date of the return in a writ of trial must be subsequent to the trial.]*

A writ of trial was directed to be tried in the Sheriff's Court, London, returnable on the 19th of January. A court was holden on the 18th, which was adjourned to the 20th, on which day the cause was tried :—Semble, that this was a mis-trial, and that application ought to have been made to a judge to have the time extended. *Mortimer v. Preedy*, 3 Mee. & W. 602.

*Writ of trial irregular in directing the recorder of a borough to summon a jury of his county.]* A writ of trial issued, directed to the recorder of the Court of Pleas of the borough of Northampton, commanding him to summon a jury of his *county*, duly qualified according to law, to try the issue joined between the parties. The cause was tried by a jury of persons resident within the borough, and not in the list of jurors for the county of Northampton, although, as it was alleged, duly qualified to be so :—Semble, that the writ was irregular in requiring the recorder to summon a jury from the *county*; but, held, that, at all events, it had not been regularly obeyed, the jury not having been taken from the county list. *Farmer v. Mountford*, 8 Mee. & W. 266.

Where the writ directed the recorder of a borough to summon a jury of the borough, duly qualified according to law :—Held, regular. *Farmer v. Mountford*, 9 Mee. & W. 100.

*Trial by proviso on writ of trial.]* Where a cause is by a judge's order directed to be tried before the sheriff, under 3 & 4 Will. 4, c. 42, s. 17, and the plaintiff neglects to proceed to trial, the defendant may take the cause down by proviso, even although it has been once tried, the court having granted a new trial. *Harrison v. Sutton*, 12 Mee. & W. 307 ; 1 Dowl. & L. 471 ; 13 Law J., Ex. 83.

*After countermand of notice of trial the writ of trial must be re-sealed.]* Where a writ of trial was obtained, and notice of trial was given for the 31st of January, which was afterwards countermanded, and fresh notice was given for the 28th of February, whicli was also countermanded, but the cause was eventually tried on the 5th of March, under a new notice, and the writ was re-sealed, with a view to trial on the 31st of January and the 28th of February, but was not re-sealed for the 5th of March, and the trial was had without such re-sealing :—Held, that the trial was void, and must be set aside ; that the writ afforded no authority for such trial ; that the fact of the defendant having appeared at the trial, and defended the action, was immaterial, for that the objection was one which could not be waived. Held, also, that the objection could not be cured by amendment ; and that, as the validity of a writ only takes effect from the actual date of its being sealed or re-sealed, the objection was not cured by the writ being resealed on the 11th of March, after the trial had been had.

If there is an amendable error patent upon a writ of trial, and, notwithstanding such error, the defendant appears at the trial and defends the action, the objection on the ground of such error is waived ; but if, on the other hand, the error is not on the face of the writ, but ascertainable only by the knowledge of some additional fact, the defendant does not waive it by going on with his defence. *Ashburton v. Sykes*, 1 Dowl. & L. 133, Q. B.

*Nonsuit on writ of trial.]* The sheriff has the same power, as to directing a nonsuit, as a judge at Nisi Prius in an ordinary case. *Watson v. Abbott*, 2 C. & M. 150; 4 Tyrw. 64; 2 Dowl. 215.

Where the under-sheriff had not stated in his notes that he had given leave to move to enter a nonsuit, the court refused a motion for that purpose. *Beverley v. Walter*, 8 Dowl. 418.

*On referring a cause on a writ of trial, no power to enter a verdict.]* Where, on the trial of a cause before the under-sheriff, a verdict was taken for the plaintiff, subject to a reference, both parties consenting that the arbitrator should have power to order a verdict to be entered for either party, the court set aside the verdict and judgment, but not the award, on the ground that the parties had no authority to consent to a verdict being so entered. *Wilson and Wife v. Thorpe*, 6 Mee. & W. 721; 9 Law J., Ex. 232; and *Harrison v. Greenwood*, 9 Jur. 1098, Q. B.; 15 Law J., Q. B. 92; 3 Dowl. & L. 353.

*Suggestion on record for costs—trial before the sheriff.]* The defendant is entitled to enter a suggestion for costs under the Tower Hamlets Court of Requests Act, 23 Geo. 2, c. 30, and need not plead the statute; and it makes no difference that the cause was tried before a judge who is not competent to certify that there was a reasonable cause of action for 40s., under the 8th section of that act. *Capes v. Jones*, 10 Jur. 393, C. P.

*Suggestion on the roll to deprive plaintiff of costs in a trial before the sheriff.]* In an action tried before the under-sheriff:—Semble, the defendant has the same time to enter a suggestion on the roll, to deprive the plaintiff of costs, under a Court of Requests Act, as he had to move for a new trial. Where the trial took place before the under-sheriff of Middlesex, in term, on the 23rd January, and the notice of taxation was given on the 25th, and the taxation and final judgment signed on the 26th, a rule obtained on the same day, but not served until the 27th, to deprive the plaintiff of costs, under a Court of Requests Act, was held sufficiently in time. *Garratt v. Babington*, 1 Dowl. & L. 820, Q. B.

Where a cause is tried by writ of trial, and execution issued in vacation, the defendant may apply in the ensuing term to enter a suggestion to deprive the plaintiff of costs, and it is not necessary that there should be a previous order to stay proceedings. *Johnson v. Veal*, 7 Dowl. 487, Ex.

Hence, an application to enter a suggestion on the roll, under the Middlesex County Court Act, for costs, may be made as well in a case tried before the sheriff as in a case tried in one of the superior courts. *Forbes v. Simmons*, 9 Dowl. 37, Q. B.

A defendant, by consenting to a cause being tried before the sheriff, under the Writ of Trial Act, knowing at the time that he was liable to be sued in a local court only, does not thereby waive his right to claim costs from the plaintiff upon his recovering less than 5*l.* *Shaw v. Oates*, 4 Dowl. 720, B. C.

The defendant is entitled to have a suggestion entered under a Court of Requests Act, and it is no waiver, though the cause was

tried before the sheriff by the defendant's consent, and though the motion for that purpose was not made till after the costs had been taxed, final judgment signed, and execution issued. *Bond v. Bailey*, 3 Dowl. 808. Ex.

The defendant held not to preclude himself from the benefit of entering a suggestion, under the Birmingham Court of Requests Act, by plea of payment into court, or having consented to an order for trial before the under-sheriff. *Turner v. Barnard*, 5 Dowl. 170, B. C.

*Signing judgment and taxing costs of writ of trial.]* After verdict for the plaintiff on a writ of trial, judgment was signed, and the costs were taxed immediately after the writ was returnable:—Held, upon the construction of the 18th and 19th sections of the 3 & 4 Will. 4, c. 42, that the judgment was regular. *Gill v. Rishworth*, 2 Dowl. & L. 416; 14 Law J., Ex. 1.

*Bill of exceptions on writ of trial.]* Where, on the trial of a cause under a writ of trial, a bill of exceptions had been tendered to the under-sheriff, which he declined to receive, the court refused to interfere to stay judgment and execution. *White v. Hislop*, 4 Mee. & W. 73; 6 Dowl. 693.

*Power of judge to certify on writ of trial.]* The judge, upon a writ of trial, has no power to certify under the Tower Hamlets Court of Requests Act, that the plaintiff had reasonable and probable cause of action to the amount of 5*l.* *Elsley v. Kirby*, 9 Mee. & W. 536; 1 Dowl. N. S. 946.

*Verdict above 20*l.* on writ of trial, how cured.]* A sheriff's jury returned a verdict for the plaintiffs for 23*l.* 5*s.* 1*d.*; the plaintiffs then entered a remittitur damna for 3*l.* 5*s.* 1*d.*:—It was held that the irregularity in the verdict, being for more than 20*l.* was cured. *Fryer v. Smith*, 1 Dowl. & L. 75; 12 Law J., C. P. 223.

*Plaintiff's costs on writs of trial—verdict under 40*s.*]* The sheriff has no power to certify under the stat. of Eliz. to deprive a plaintiff of costs. *Jones v. Barnes*, 2 M. & W. 313; and *Wardroper v. Richardson*, 1 Ad. & E. 75.

*Staying execution on writs of trial.]* The statute 3 & 4 Will. 4, c. 42, s. 19, re-enacts, that all the provisions of the statute 1 Will. 4, c. 7, shall, "as far as the same are applicable thereto," be extended to judgments and executions upon writs of inquiry and writs of trial:—Held, therefore, that the court might set aside a judgment and execution on a writ of trial in the same manner as in writs of inquiry, under the 4th section of 1 Will. 4, c. 7, even though no application for that purpose, or an unsuccessful one, might have been made to the sheriff who tried the cause, or to a judge. *Angel v. Ihler*, 5 Mee. & W. 600; 9 Law J., Ex. 8; 7 Dowl. 846.

*Writ of trial—motion for new trial, verdict against evidence.]* Where the only ground of application for a new trial was, that the verdict was against the evidence, and no counsel attended at the trial:—

Held, that no affidavit stating the ground of the motion was necessary; when the only ground for moving is apparent upon the sheriff's notes, which are before the court. *Henning v. Ackerman*, 2 Dowl. & L. 733; 14 Law J., Q. B. 136.

*Writ of trial, verdict under 5l.—motion for new trial.]* In the case of a writ of trial, no new trial will be granted on the ground of the verdict being against evidence, when the verdict is for less than 5l. *Packham v. Newman*, 1 C. M. & R. 585; and *Williams v. Evans*, 2 Mee. & W. 226; and *Fleetwood v. Taylor*, 6 Dowl. 996, B. C.

And where a verdict is found for the defendant, and the sum claimed by the plaintiff is less than 5l., the court will not interfere to disturb it on the ground of its being against evidence. *Lyddon v. Coombes*, 5 Dowl. 560.

*Writ of trial—motion for new trial after judgment signed.]* On an application to set aside the verdict and grant a new trial, in a cause tried before the sheriff, in which judgment had been signed:—Held, that it was unnecessary to give notice of the intended application, or to make any reference to the judgment in the rule. *Brook v. Tidy*, 10 Jur. 967.

*Affidavit verifying the sheriff's note on motion for new trial.]* An affidavit of verification of the under-sheriff's notes, made on the same paper as the notes, and at the foot thereof, may be read, although defectively entitled, if the notes are properly entitled. *Docter v. Stanley*, 9 Law J., C. P. 199.

*Motion for new trial before the sheriff, when to be made.]* A motion for a new trial in a cause heard before the sheriff under the Writ of Trial Act must be made within the four days, and if the sheriff's notes cannot be obtained within that time, there must be a special affidavit of facts. *Muppin v. Gillatt*, 4 Dowl. 190, Ex.

It is no excuse for not making the motion within that time, that the cause was tried in a distant county; a special application should be made for an extension of the time. *Wheeler v. Whitmore*, 4 Dowl. 235, Ex.

But the court will on application allow further time to make a motion for a new trial if the under-sheriff does not furnish his notes of the trial in proper time. *Thomas v. Edwards*, 2 Dowl. 664, Ex.

*Sheriff's notes on motion for new trial.]* The court requires that the sheriff should have been applied to for his notes, which, if furnished, should be produced; but if not, that such refusal and the facts of the case be laid before the court upon affidavit. *Hall v. Middleton*, 4 N. & M. 368; 4 Ad. & E. 107; and *Mansfield v. Brearey*, 1 Ad. & E. 347.

The sheriff's notes produced on a motion for a new trial must be verified by affidavit; and where certified under his seal only, it was insufficient. *Johnson v. Wells*, 2 C. & M. 428; 2 Dowl. 352.

The court will dispense with the production of the sheriff's notes, if the motion be made by counsel engaged at the trial. *Barnett v. Glossop*, 3 Dowl. 625, C. P.

An affidavit may be filed on the other side containing statements of evidence given at the trial, but not reported in the notes of the under-sheriff. *Lilley v. Johnson*, 2 Mee. & W. 386; 5 Dowl. 606.

Where the motion is on the ground of the absence of evidence to warrant the verdict of the jury, it is not competent for the other party to use affidavits. *Jones v. Howell*, 4 Dowl. 176, Ex.

Where the objection is founded upon the pleadings, it is not necessary to have an affidavit of the pleadings, as the postea is supposed to be in court. *Milligan v. Thomas*, 2 C. M. & R. 756; 4 Dowl. 373.

The practice of requiring the notes of the sheriff, or the judge of an inferior court of record, on moving for a new trial, does not apply to cases before the Recorder of Chester. *Lawlor v. Clements*, 8 Dowl. 688, Q. B.

It is not necessary that the copy of the under-sheriff's or secondary's notes, upon which a party moves for a new trial of a cause tried on a writ of trial, should be signed by that officer. *Ellis v. Mason*, 8 Law J., Q. B. 196; 7 Dowl. 598.

The notes of the sheriff or other judge on motion for a new trial must be produced and verified by affidavit, such notes, however, need not be filed. *Mansfield v. Brearey*, 1 Ad. & E. 347; 3 N. & M. 471.

*Attorney cannot act as advocate and witness.]* Where an attorney gives evidence after opening the case as advocate, a new trial will be granted. *Dunn v. Packwood*, 11 Jur. 242, B. C.

#### WRIT OF PRIVILEGE.

*Writ of privilege.]* A writ of privilege merely amounts to a notice that the party is privileged, and is no stay of proceedings. *In re Thompson*, 2 Mee. & W. 645; 5 Dowl. 745.

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